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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

CITY OF SEATTLE, ET AL.,

Petitioners,

v.

PAUL A. BASCOMB, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the collateral order doctrine permits an immediate appeal from an order denying a claim of qualified immunity (but dismissing a qualified immunity defense) in a 42 U.S.C. § 1983 civil rights action on the ostensible ground that issues of fact concerning the reasonableness of petitioners' actions existed.

2. Whether law enforcement officials involved in the use of deadly force are entitled to qualified immunity where, viewing the evidence in the light most favorable to respondents, the actions of petitioners were objectively reasonable under the particular circumstances that petitioners faced.

PARTIES TO THE PROCEEDING

Petitioners Robert Lisoski and Patrick Fitzsimons were Defendants and Appellants below. The City of Seattle was a Defendant below. Respondents Paul A. Bascomb, as personal representative of the estate of Erdman Bascomb, and Frank and Flora Bascomb, were Plaintiffs and Appellees below.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Robert Lisoski and Patrick Fitzsimons, Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit (the "Ninth Circuit") filed on September 21, 1992.

OPINIONS BELOW

The unpublished Order of the United States District Court for the Western District of Washington (the "District Court") is included at Petitioners' Appendix[1] "A."

[1] Hereafter "Pet. App."

The Order of the Ninth Circuit noting a possible jurisdiction defect in the appeal is included at Pet. App. "B." The Order of the Ninth Circuit dismissing the appeal is included in Pet. App. "C."

JURISDICTION

The Order of the Ninth Circuit dismissing the appeal was filed on September 21, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be siezed."

42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or useage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the

party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

1. Statement of Facts.

This case involves whether petitioners are entitled to qualified immunity from suit in a situation involving the use of deadly force by petitioner Lisoski, a Seattle police officer. Petitioner Fitzsimons is the Seattle Police Chief.

On February 17, 1988, members of the Seattle Police Department Anti-Crime Team ("ACT") served a search warrant for narcotics on a residential apartment in the City of Seattle, Washington. Other members of the ACT had previously served a search warrant at this residence and found six or seven people present. (ER 33, inquest testimony of Baker)[2] The ACT members knocked on the door and announced their presence before forcibly entering the apartment. (ER 55, inquest findings 4-6)

Petitioner Lisoski was the first officer to enter the apartment. After stepping into the apartment, he observed a person on the couch in the living room. In his testimony before the inquest jury, petitioner Lisoski

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[2] "ER" refers to the Excerpts of Record filed in the Ninth Circuit. "CR" refers to the Clerk's Record in the District Court.

stated that the "room was dark" and "[i]t was like looking through a tunnel." (ER 30) He continued his testimony:

> I noticed movement over here. As I looked I saw a leg move. I looked up to the upper body and I saw an arm come out straight like this with an object in the hand and a body twisted, raised up like this. (Indicating.) . . . My thought at that time was I was going to be shot. I knew I was going to be shot. I stepped back and raised my revolver and I raised it and I fired.

Id. Officer Lisoski then testified that although he could not see the object in the person's hand, he thought it was a gun:

> Because the way the arm came out so rapidly, and the hand. It was pointed directly at me. And then the body raising up. Like somebody was going – like I was going to be shot . . . I knew it was aimed directly at me. . . .

(ER 30-31)[3] The bullet fired from Officer Lisoski's revolver struck and killed Erdman Bascomb. (App. A, p. 2; ER 55, inquest findings 1-3; ER 145-146, Aff. of Dr. Fligner)

The Seattle District Court conducted a coroner's inquest into the incident. Respondents' counsel participated. (ER 53) Based on the evidence presented, the inquest jury unanimously found that (1) Erdman

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[3] This testimony is fundamentally the same as the statement given by Officer Lisoski two days after the incident. (*See* ER 109-110)

Bascomb pointed an object at or in the direction of petitioner Lisoski; (2) petitioner Lisoski believed that the object was a gun; (3) petitioner Lisoski's belief was "reasonable in light of the facts, circumstances and conditions as they appeared to [petitioner Lisoski] at the time"; (4) petitioner Lisoski reasonably believed that "Erdman Bascomb intended to inflict death or great bodily harm on [petitioner] Lisoski or the other officers in his company and believed that there was imminent danger of such harm being accomplished"; and (5) "the force used by Officer Lisoski [was] necessary." (ER 55-57)

At the time of this incident, the Seattle Police Department had in place a specific policy governing an officer's discharge of a firearm. S.M.C. 3.28.115 provided:

> While engaged in performance of duties of a Seattle Police Officer, an officer may discharge a firearm at another person when necessary to . . . [d]efend himself or another person from death or serious bodily injury. . . .

(CR 60, Ex. A)

During summary judgment proceedings in the civil lawsuit, respondents submitted affidavit testimony of a former police officer, who was retained as a consultant. He opined, *inter alia*, that serving the warrant at night and in a fashion where the door might be broken down created an unreasonable risk for occupants and the officers; and that petitioner Lisoski's failure to use a flashlight while entering the apartment was not reasonable and led, in his opinion, to the use of unreasonable force. (ER 79-84, Aff. of McBride)

Petitioners offered affidavit testimony of a criminal justice professor who stated that there was no requirement or prohibition against a warrant being executed at night; a night execution is not unreasonable; there is no requirement that an officer enter a room with a flashlight lit and, as stated in his book, doing so makes an officer a target; and a "reasonably trained officer when confronted with what he believed to be an armed individual and fearing for his life or the safety of other officers with him would fire just as [petitioner] Lisoski did." (ER 135-143, Aff. of Perry)[4]

Petitioners also submitted affidavit testimony of a commander with the Olympia Police Department. He was the former supervisor of Mr. McBride, the former officer who offered affidavit testimony on behalf of respondents. (ER 173-175, Aff. of Curtright) He, like Mr. Perry, disagreed with the statements of Mr. McBride and stated that there "is no basis for a reasonably trained officer to believe that he would be violating anyone's rights if he was not in compliance with the procedures set forth in the Affidavit of Robert McBride." (ER 174)

Respondents also offered affidavit testimony of a forensic scientist. (ER 100-103, Aff. of Murren) She stated that, based on her review of the autopsy report and photographs, including photographs showing probes demonstrating bullet paths, it was her opinion that Mr. Bascomb was turning his body away from Officer Lisoski

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[4] Mr. Perry authored the textbook titled *Basic Patrol Procedures*, which is used in every policy academy in the United States as well as numerous colleges.

at the time he was shot, contrary to Officer Lisoski's testimony. (*Id.*)

However, the medical examiner who performed the autopsy of Mr. Bascomb's body disagreed with Ms. Murren. She stated that "it is my opinion that the path of the bullet through the body is consistent with the shot being fired from a horizontal plane at a person on the loveseat leaning forward in a sitting position and twisting toward the door", as stated by petitioner Lisoski. (ER 144, 146, Aff. of Dr. Fligner)[5]

2. Proceedings in the District Court.

Plaintiff-respondent Paul Bascomb, as personal representative of the estate of Erdman Bascomb, brought this 42 U.S.C. § 1983 action against the City of Seattle, petitioner Seattle Police Chief Patrick Fitzsimons, and petitioner Police Officer Robert Lisoski for the shooting death

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[5] It is of interest that Dr. Fligner's conclusions are those of a trained physician board certified in forensic pathology. She has performed over fourteen hundred autopsies. Moreover, her conclusions are based on her personal examination and autopsy of the body and her visit to the incident scene before the body was removed.

In contrast, Ms. Murren's opinions are based on her review of Dr. Fligner's report and photographs taken during the autopsy. She is not a trained physician; she has a chemistry degree.

The District Court discussed this expert testimony and stated that, regardless of the dispute concerning the direction that Mr. Bascomb was turning his torso at the time he was shot, "it appears that he was lifting his body up from the couch." (App. A, p. 16)

of Erdman Bascomb in the execution of a legally valid search warrant.[6] They contended that petitioner Lisoski's actions in apprehending Erdman Bascomb by the use of deadly force unreasonably violated Erdman Bascomb's Fourth Amendment rights under *Tennessee v. Garner*, 471 U.S. 1 (1985). Petitioners Lisoski and Fitzsimons believing their actions objectively reasonable, sought summary judgment of dismissal based upon qualified immunity. Respondent filed a cross motion seeking summary judgment of dismissal of the defense of qualified immunity.

The District Court noted that, under *Hunter v. Bryant*, 502 U.S. ___, 116 L.Ed.2d 589 112 Sup. Ct. 534 (1991), this Court instructed the Ninth Circuit that:

> A court "should ask whether the [government officers] acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact."

(App. A, p. 14, *citing Hunter v. Bryant*) The District Court recognized that, under *Hunter*, "the court essentially is required to apply a different standard to a qualified immunity summary judgment determination then it would on other summary judgment motions." (*Id.*) However, the District Court failed to apply that standard. Instead, because the dispositive issue was "one of the reasonableness of the government officer's conduct," the

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[6] Respondents alleged the District Court had jurisdiction under 42 U.S.C. §§ 1983, 1986, 1988; 28 U.S.C. §§ 1331 and 1343(a)(3); and the U.S. Constitution.

District Court "applied traditional summary judgment standards." (App. A, p. 15)

Under that standard, the District Court denied petitioners' motions for dismissal and concluded: (a) "a genuine issue of material fact [exists] as to whether [petitioner] Lisoski's actions were reasonable"; and (b) "the reasonableness of [petitioner] Fitzsimons' actions must be left to the jury." (App. A, pp. 16-17, 29, 37) In apparent contradiction, however, the District Court granted respondents' motion striking the defense of qualified immunity. (App. A, p. 17)

3. Proceedings in the Court of Appeals.

Petitioners Lisoski and Fitzsimons appealed to the Ninth Circuit under 28 U.S.C. § 1291 and sought reversal of (a) the denial of their summary judgment motions based on qualified immunity, and (b) the ruling granting respondents' cross-motion for summary judgment dismissing the qualified immunity defense. The Ninth Circuit issued an Order in which it stated that the "record reveals a possible jurisdictional defect in the appeal," citing *Velasquez v. Senko*, 813 F.2d 1509 (9th Cir. 1987). (App. B) It instructed that the jurisdictional issue be addressed "either by appellee's in a motion to dismiss the appeal, or, if no motion to dismiss is filed, by appellants in their opening brief." (*Id.*)

Respondents filed a motion to dismiss appeal. The Ninth Circuit dismissed the appeal on the basis of the *Velasquez* decision, in which the Ninth Circuit held that a

claim of qualified immunity is not appealable where it is bound up with disputed factual issues. (App. C)

REASONS FOR GRANTING THE WRIT

Petitioners are entitled to summary judgment on qualified immunity grounds if "reasonable [officials] could have believed [petitioners' actions] to be lawful, in light of clearly established law and the information [petitioners] possessed." *Hunter v. Bryant*, 116 L.Ed.2d at 595, *quoting Anderson v. Creighton*, 483 U.S. 635, 641 (1987). The "reasonableness" of petitioner Lisoski's use of force "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). The "calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Graham v. Connor*, 490 U.S. at 396-397. The question of qualified "[i]mmunity ordinary should be decided by the court long before trial." *Hunter v. Bryant*, 116 L.Ed.2d at 596; *citing Mitchell v. Forsyth*, 472 U.S. 511, 527-29 (1985). It is "separate from the merits of the underlying action" even though there may be factual overlap. *Mitchell v. Forsyth*, 472 U.S. at 528-529.

In refusing to review the District Court's decision, the Ninth Circuit ignored these principles. It, like the District Court, misperceived the proper standard. In turn, the District Court applied a dramatically different and

improper standard, which deprived petitioners of a unique federal right – the right to qualified immunity from suit. Instead of applying the *Hunter* standard – which was the progeny of a long line of this Court's precedent – The District Court erroneously "applied traditional summary judgment standards." (App. A, p. 15) The District Court's sole justification was that the ultimate question involved the "reasonableness" of petitioners' action. (*Id.*)

The error of this approach is apparent. It cuts the very heart from the qualified immunity defense. Qualified immunity exists to permit public officers performing discretionary functions to be free from "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). It is much more than merely a defense to liability. There is no place in the qualified immunity analysis for a court to apply "traditional summary judgment standards."

Rather than asking whether a reasonable officer could have believed that deadly force was necessary under the particular circumstances that petitioner Lisoski found himself in, the District Court, in hindsight, instead asked if reasonable officers could *disagree* whether deadly force was necessary. Because the District Court concluded that disagreement could exist, it ruled that "a grant of

summary judgment based on qualified immunity is inappropriate." (App. A, p. 15)[7]

Had the District Court conducted the proper inquiry, it would have concluded that, even viewing the facts in the light most favorable to respondents, petitioners actions were objectively reasonable and they therefore were entitled to qualified immunity.

In refusing to review the District Court's decision, the Ninth Circuit compounded this error. It deprived petitioners of that which they are entitled to, an early determination of qualified immunity. The Ninth Circuit 's refusal was particularly egregious in that its conclusion (the existence of fact issues) was directly related to the District Court's application of an improper standard.

This Court should accept review. The lower courts' decisions directly contravene decisions of this Court. Those decisions threaten a unique federal interest – the right to an early and proper consideration of a qualified immunity defense. The lower courts' decisions will chill the actions of conscientious law enforcement officials. The decisions below, therefore, present questions of exceptional importance.

In addition, the federal courts need further guidance on the proper application of qualified immunity. The District Court, and the Ninth Circuit, ignored this Court's admonitions contained in *Hunter v. Bryant*, where this

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[7] In contradiction, the District Court granted respondents' motion for summary judgment dismissing petitioners' qualified immunity defense. (App. A, p. 17)

Court summarily reversed the Ninth Circuit when it substituted its judgment for that of an objective officer on the scene.

The error in the lower courts' rationale, and the results reached, are so plain that plenary review might not be warranted. Instead, we ask that the lower courts' decisions be summarily reversed.

1. This case presents important questions concerning the qualified immunity of government officials being sued for damages based on the performance of official acts. Contrary to the decisions of this Court, the Ninth Circuit concluded that the collateral order doctrine does not permit an appeal where a district court rejects a claim of qualified immunity on the ostensible and incorrect ground that an issue of fact exists regarding the "reasonableness" of the officials' acts. The Ninth Circuit's rejection of the appeal frustrates the very purposes of qualified immunity, the prompt disposition of insubstantial claims, and to permit public officials to be free from the rigors and expense of discovery and litigation.

The Ninth Circuit's refusal is especially egregious in that the District Court applied an improper standard. Contrary to the decisions of this Court, the District Court "applied traditional summary judgment standards" and concluded that "a genuine issue of material fact" existed, justifying the denial of the qualified immunity defense. (App. A, pp. 15, 17, 29) This unsupportable ruling, which the Ninth Circuit refused to even consider on appeal, deserves review.

The Ninth Circuit held that the District Court's denial of petitioners' claim to qualified immunity was not

a final appealable order under 28 U.S.C. § 1291, in reliance on *Velasquez v. Senko, supra.* The Ninth Circuit'a application of that decision, and its dismissal of petitioners' qualified immunity appeal, conflicts with *Hunter v. Bryant,* and *Mitchell v. Forsyth,* and was based on a misapplication of the collateral order doctrine pronounced in *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949).

In *Cohen,* this Court held that interlocutory orders were immediately appealable under 28 U.S.C. § 1291 if they

> finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

337 U.S. at 546. This Court has held on numerous occasions that interlocutory orders rejecting claims of immunity are immediately appealable. *See e.g. Hunter v. Bryant* (denial of motion for summary judgment on qualified immunity grounds); *Mitchell v. Forsyth,* 472 U.S. at 530 (denial of qualified immunity); *Nixon v. Fitzgerald,* 457 U.S. 731, 742 (1982) (denial of absolute immunity); *Harlow v. Fitzgerald,* 457 U.S. at 806 n. 11, 813-20 (qualified and absolute immunity questions); *Anderson v. Creighton,* 483 U.S. 635 (denial of motion for summary judgment on qualified immunity grounds).

Indeed, in *Mitchell v. Forsyth,* this Court expressly concluded that a district court's decision rejecting a government official's claim of qualified immunity is immediately appealable under the three-part *Cohen* rule:

First, this Court ruled that such a decision is effectively unreviewable on appeal from a final judgment because qualified immunity "is an *immunity from suit* rather than a mere defense to liability; . . . it is effectively lost if a case is erroneously permitted to go to trial." 472 U.S. at 526 (emphasis in original).

Second, this Court ruled that such a decision "conclusively determines the defendant's claim of right not to *stand trial* on the plaintiff's allegations" and therefore is a fully consummated decision. 472 U.S. at 527 (emphasis in original).

Third, this Court ruled that such a decision is separate from the merits of the action because "the appealable issue is a purely legal one: whether the facts alleged (by the plaintiff, or, in some cases, the defendant) support a claim of violation of clearly established law." 472 U.S. at 528 n. 9.

An appeal must similarly be allowed in this case where petitioners claim that, under the facts in the summary judgment record, their actions were objectively reasonable. The District Court's decision easily meets all the requirements of the collateral order doctrine.

First, the District Court's decision would be effectively unreviewable following a final judgment. Qualified immunity is "an entitlement not to stand trial" (*Mitchell v. Forsyth*, 472 U.S. at 525) and a means of freeing public officials from "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow v. Fitzgerald*, 457 U.S. at 814. The District Court's

decision would require petitioners to stand trial. Petitioners' rights to immunity would be effectively lost. This prong of the *Cohen* test is met.

Second, the District Court's decision conclusively rejected petitioners' entitlement to qualified immunity and, indeed, dismissed petitioner Lisoski's qualified immunity defense. As in *Mitchell*, the District Court's decision expressly rejected petitioners' claim "of right not to *stand trial.*" *Mitchell v. Forsyth*, 472 U.S. at 527 (emphasis in original). There are no further steps that respondents can take in the trial court to avoid a trial. The decision is fully consummated.

Third, and most important, the District Court's qualified immunity determinations are conceptually distinct from the merits of respondents' claims. Here, the issue before the trial court was whether, viewing the evidence in the light most favorable to respondents, the actions of petitioners were objectively reasonable with respect to the particular facts and circumstances that petitioners faced. *See e.g. Anderson v. Creighton*, 483 U.S. at 646. If yes, petitioners are immune. In *Mitchell*, this Court expressly recognized that this question is distinct from the underlying claim and clearly a question of law: "[T]he appealable issue is a purely legal one: whether the facts alleged (by the plaintiff, or, in some cases, the defendant) support a claim of violation of clearly established law." 472 U.S. at 528 n. 9.

Despite that clear precedent, both lower courts conducted erroneous analyses. The District Court gave lip service to the *Hunter* standard and then improperly "applied traditional summary judgment standards."

(App. A, p. 15) That misapplication apparently led the District Court to reject the qualified immunity defense on the ostensible basis of the existence of fact issues. (App. A, pp. 17, 29)

Error compounded error. The Ninth Circuit refused to even consider respondents' appeal. It wrongly concluded that the District Court's rejection of the qualified immunity claims were "bound up with disputed factual issues" on the merits. (App. C) It based this ruling on *Velasquez v. Senko.*

The Ninth Circuit's application of *Velasquez* was wrong. As a result, the Ninth Circuit failed to properly recognize the collateral order principles expressly recognized in *Mitchell.* In *Velasquez,* the plaintiffs brought civil rights' claims against federal officials for allegedly conducting improper searches. Before discovery began, the officials moved for summary judgment based on qualified immunity. They claimed they were not present during the operations and did not participate in the planning or direction of the raids. The district court concluded that discovery had not yet commenced and denied summary judgment *without* prejudice.

The officials appealed. The Ninth Circuit concluded that the district court's order was not appealable. It concluded – despite the pronouncement in *Mitchell* – that the qualified immunity inquiry "present[ed] a disputed factual issue, inextricably bound up in the underlying claim: whether the defendants were present at the raids and the extent to which they participated in or directed the operations." 813 F.2d at 1511.

In concurrence, Judge Hall agreed with the majority's decision on the sole ground that since the order denying the motion was entered without prejudice and prior to discovery, it "was not a final determination of the defendants' right to qualified immunity" under *Cohen* and *Mitchell*. 813 F.2d at 1512. She noted that because the majority's decision was based on the existence of disputed factual issues and the conclusion that the appeal did not present "a purely legal issue, separable from the merits," it was contrary to this Court's pronouncements in *Mitchell*. 813 F.2d at 1512-1513.

As Judge Hall correctly recognized, this Court in *Mitchell* "specifically rejected the notion that 'any factual overlap between a collateral issue and the merits of the plaintiff's claim is fatal to a claim of appealability.' " 813 F.2d at 1513, *quoting Mitchell v. Forsyth*, 472 U.S. at 529 n. 10. She acknowledged that this Court in *Mitchell* emphasized " 'resolution of [appealable] legal issues will entail consideration of the factual allegations that make up the plaintiff's claim for relief.' " 813 F.2d at 1513, *quoting Mitchell v. Forsyth*, 472 U.S. at 528.

The warnings sounded by Judge Hall are applicable here. The Ninth Circuit's rote application of *Velasquez* in this case, without discussion, was clearly incorrect and deprived petitioners of their rights to have the question of immunity "decided by the court long before trial." *Hunter v. Bryant*, 116 L.Ed.2d at 596.

The appealability of orders denying qualified immunity is an important question that should be clarified and resolved by this Court.

2. Because the Ninth Circuit held that it lacked jurisdiction, it did not review the most egregious aspect of the District Court's decision, the rejection of petitioners' qualified immunity claims. That rejection was based on the District Court's improper application of "traditional summary judgment standards." (App. A, p. 15) Instead, the District Court should have asked whether reasonable officials could have believed that petitioners' actions were lawful "in light of clearly established law and the information [petitioners] possessed." *Anderson v. Creighton*, 483 U.S. at 641. The error of the District Court's approach is manifest.

Petitioners, sued in their personal capacity for damages under 42 U.S.C. § 1983, are entitled to assert the defense of qualified immunity. *Hunter v. Bryant*; *Graham v. Connor*; *Anderson v. Creighton*. Petitioners would *not* be immune *only* "if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that [petitioners' actions were reasonable]; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

A crucial feature of the qualified immunity standard, ignored by the District Court, is that a damages action may not proceed simply because a plaintiff has claimed that an after-the-fact inquiry, based on facts unavailable to the defendant, could disclose that constitutional rights were violated. Such a result could lead to unduly timid law enforcement; the official defending the lawsuit and facing potential personal liability would have a strong incentive to "error always on the side of caution." *Davis v. Scherer*, 468 U.S. 183, 196 (1984). The fear of being sued

would " 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.' " *Harlow v. Fitzgerald*, 457 U.S. at 814 (bracket in original, citation omitted).

Thus, as the District Court failed to recognize, the qualified immunity standard does not turn on the issue of whether petitioners were mistaken in their interpretation of events. It does not involve the issue of whether public officials, in hindsight, might have made different decisions. If reasonable officials could conclude that petitioners were justified in making the decisions they made, petitioners were entitled to immunity.

The nature of the reasonableness requirement of the Fourth Amendment buttresses the conclusion that the District Court erred in substituting its judgment for that of petitioners. That standard addresses the same considerations as the qualified immunity standard – the need to permit law enforcement officials to make split second decisions based on the facts and circumstances presented to them, rather than viewing the actions with the safe and sanitized vision of hindsight.

This Court has ruled that apprehension by the use of deadly force is a seizure subject to the reasonableness requirements of the Fourth Amendment. *Tennessee v. Garner*, 471 U.S. at 7. However, the nature and quality of the intrusion must be balanced against the importance of the governmental interests. *Id.* at 8. Thus, an officer may use deadly force if, under the circumstances, he reasonably believed that force was necessary to protect himself or others from death or serious physical harm. *Id.* at 11-12.

In this case, the facts and circumstances concerning petitioner Lisoski's use of force establish that a reasonable officer could conclude his actions were proper. Here, it is undisputed that members of the Seattle Police Department ACT were serving a search warrant for narcotics on a residential apartment, which had previously been searched. (ER 33) The ACT members knocked and announced before forcibly entering the apartment. (ER 55, inquest findings 4-6) Petitioner Lisoski was the first officer to enter the apartment, which was dark. Immediately after entering, he saw a person rising from the couch and point an object at him, which he believed was a gun. Fearing for his life, he fired his weapon. The bullet struck and killed Erdman Bascomb. (App. A, p. 2; ER 30-31; 55; 109-110; 145-46)

A coroner's inquest jury examined the circumstances of the incident. The jury unanimously found (1) Erdman Bascomb pointed an object at petitioner Lisoski; (2) petitioner Lisoski believed that object was a gun; (3) petitioner Lisoski's belief was "reasonable in light of the facts, circumstances and conditions as they appeared to [petitioner] Lisoski at the time;" (4) petitioner Lisoski reasonably believed that those circumstances presented imminent danger of death or bodily injury to petitioner Lisoski and his colleagues; and (5) "the force used by [petitioner] Lisoski [was] necessary." (ER 56-57)

Even viewing the record in the light most favorable to respondents, there is no evidence that could lead a reasonable officer in petitioner Lisoski's position to conclude that his actions were objectively unreasonable. Indeed, the District Court concluded "it may well have been reasonable for [petitioner] Lisoski to fire his weapon

once he perceived that an individual in the apartment was raising himself up off the couch and pointing an object towards him. . . . " (App. A, p. 16) However, because the District Court applied the wrong standard, it erroneously concluded that petitioners were not entitled to qualified immunity.

In support of their claim that petitioner Lisoski's actions were not objectively reasonable, respondents submitted affidavit testimony of a former police officer who opined that petitioner Lisoski's actions were not reasonable because he did not use a flashlight, he shot in the dark without knowing definitively what Mr. Bascomb had in his hand, and the raid should not have been conducted at night and in a fashion where the door might be broken down. (ER 79-84, Aff. of McBride) His statements consist of nothing more than after-the-fact opinion and speculation. The opinions are not based upon fact. They were not made from the perspective of petitioner Lisoski. Mr. McBride does not, and indeed cannot, contend that his opinions are in conformance with standards from the law enforcement community.

In turn, petitioners offered affidavit testimony establishing that police warrants may reasonably be executed at night and that the use of flashlights, as Mr. McBride suggested, can create a danger to the officer. (ER 135-143, Aff. of Perry) Indeed, Mr. Perry opined that petitioner Lisoski acted reasonably. (*Id.*)

At best, respondents' assertions demonstrate only that "officers of reasonable competence could disagree on this issue. . . . " *Malley v. Briggs*, 475 U.S. at 341. That is

not enough to overcome immunity. Under such circumstances, "immunity should be recognized." *Id.*[8]

While the District Court apparently believed that its version of the facts and circumstances – in hindsight and with the luxury to carefully consider the matter – was itself reasonable or perhaps even more reasonable than the conclusion of petitioner Lisoski, that is entirely irrelevant to the analysis that the District Court should have conducted. Under settled legal doctrine, a court may not deny qualified immunity on the ground that it or a finder of fact – with a luxury of hindsight, and the benefit of full briefing, argument, and time for consideration – might reasonably arrive at a different interpretation of the facts and circumstances than the one on which an officer acted.

Petitioner Fitzsimons was also entitled to immunity. First, because petitioner Lisoski's actions did not deprive Mr. Bascomb of any constitutional rights, no liability can attach to petitioner Fitzsimons' actions. Second, there is

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[8] The opinion of a forensic scientist, offered by respondents, that Mr. Bascomb was turning his body away from petitioner Lisoski at the time he was shot does not alter this conclusion. (ER 100-103) She is not a trained forensic pathologist and her opinions were based only on her review of the autopsy report and photographs prepared at the behest of Dr. Fligner. Indeed, Dr. Fligner, a board certified forensic pathologist who actually performed the autopsy of Mr. Bascomb's body, stated that the evidence was consistent with Mr. Bascomb turning towards the door when he was shot, as petitioner Lisoski testified. (ER 144-146) Moreover, this apparent conflict is not material. Both opinions support the fact that Mr. Bascomb "was lifting his body up from the couch" when the shot was fired. (App. A, p. 16)

no evidence of any personal impropriety attributable to petitioner Fitzsimons.

Respondents claim that petitioner Fitzsimons bears individual liability for allegedly failing to adequately train, supervise and discipline officers with respect to nighttime searches and the use of firearms. They contend that these deeds set in motion a series of acts that led to the shooting in this case, and that petitioner Fitzsimons' conduct constituted deliberate indifference to Mr. Bascomb's constitutional rights. *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 388-389 (1989). Respondents are mistaken. There is no evidence in the record of any improper training of petitioner Lisoski relative to the use of deadly force. Indeed, the City of Seattle's firearms policy is a reiteration of the *Tennessee v. Garner* standard.

Petitioner Fitzsimons was not personally involved in any way with the use of force against Erdman Bascomb. Petitioner Lisoski's use of force was objectively reasonable in that he reasonably feared for his life. Under all of the circumstances, no reasonable police chief could objectively conclude that petitioner Fitzsimons' actions were unreasonable.

The *only* proper inquiry is whether petitioners themselves acted within the bounds of reason and competence in assessing the situation. Had the District Court asked this question, it would have concluded that petitioners acted reasonably and were therefore entitled, as a matter of law, to immunity.

CONCLUSION

The Petition for Writ of Certiorari should be granted and the Court should summarily reverse on the ground that petitioners were entitled to qualified immunity. Alternatively, the Court should reverse and remand with instructions to apply the appropriate legal standard to petitioners' qualified immunity claims.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PAUL A. BASCOMB, as Personal Representative of the Estate of Erdman Bascomb, et al., Plaintiffs, v. THE CITY OF SEATTLE, et al., Defendants.	NO. C91-51R ORDER RE PENDING MOTIONS ON LIABILITY ISSUES

THIS MATTER comes before the court on the parties' cross-motions for summary judgment on the issue of defendant Robert Lisoski's qualified immunity, on defendant Patrick Fitzsimons' motion for summary judgment of dismissal of all claims against him, on defendant City of Seattle's motion for summary judgment of dismissal of plaintiffs' municipal liability claim, on defendants' motions to strike the affidavits of Carol Murren and Robert McBride, and on plaintiffs' motion for summary judgment of dismissal of defendants' affirmative defenses Nos. 3-6. Having reviewed the motions, together with all documents filed in support and in opposition, having heard oral argument and being fully informed, the court finds and rules as follows:

I. FACTUAL BACKGROUND

On February 17, 1988, during the execution of a search warrant at 3610 36th Ave. S., Apt. C in Seattle, Officer Robert Lisoski mistakenly shot and killed Erdman Bascomb. In January 1991, plaintiff Paul Bascomb, the personal representative of the estate of Erdman Bascomb, filed this action against the City of Seattle, Police Chief Patrick S. Fitzsimons and Officer Lisoski. In August 1991, this court granted plaintiff's motion to amend the complaint to include Erdman Bascomb's parents, Frank and Flora Bascomb, as plaintiffs. Plaintiffs' complaint alleges three causes of action: (1) a civil rights violation based on the acts of Officer Lisoski; (2) a civil rights violation based on the unlawful policies, practices and customs of the City of Seattle; and (3) a negligence claim against Officer Lisoski.

Defendants now move for summary judgment on the issue of Officer Robert Lisoski's qualified immunity from suit. Plaintiffs move for summary judgment of dismissal of the qualified immunity defense. Defendants also move to strike the affidavits of Robert McBride and Carol Murren filed in support of plaintiffs' memoranda on the qualified immunity issue. Defendants further move for summary judgment of dismissal of plaintiffs' claims against Police Chief Patrick Fitzsimons and for summary judgment of dismissal of plaintiffs' civil rights claims based on alleged unlawful policies, practices and customs of the City of Seattle. Plaintiffs also move for partial summary judgment on defendants' affirmative defenses Nos. 3-6.

II. DISCUSSION

A. Motion to Strike Affidavits of Robert McBride and Carol Murren

In support of their motion for summary judgment of dismissal of the qualified immunity defense and in opposition to defendants' motion on the same issue, plaintiffs have submitted the affidavits of Robert McBride, a former police officer who is currently a private investigator, and Carol Murren, a forensic scientist. Mr. McBride's affidavit addresses the procedure used by Officer Lisoski and the Anti-Crime Team to execute the Bascomb warrant. Ms. Murren's affidavit discusses the position of Erdman Bascomb's body relative to Officer Lisoski at the time Mr. Bascomb was struck by the bullet that killed him.

Under Fed. R. Civ. P. 56(f), affidavits submitted in support of a motion for summary judgment are to set forth "such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Defendants argue that as neither Mr. McBride nor Ms. Murren is qualified as an expert within the meaning of Fed. R. Evid. 702, their affidavits would not be admissible in evidence and must be stricken. Defendants argue that although it is permissible for an expert to compare the conduct of parties to the industry standard, as Mr. McBride does in his affidavit, Mr. McBride sets forth no basis upon which the court may find that he has established an industry standard. Defendants have submitted their own affidavits indicating that Mr. McBride, when he was with the Olympia Police Department, did not himself follow any of the procedures he sets forth as being industry standards. *See*

Reply Memorandum Regarding Robert McBride and Carol Murren at 2; Affidavit of Tim Perry; Affidavit of Commander William Curtright. Defendants further argue that Ms. Murren sets forth no information indicating that she is qualified to determine the path of a bullet through a human body or how to locate the relationship of the weapon to the human body. Defendants also point out that Ms. Murren never actually viewed Mr. Bascomb's body but rather relies in her affidavit entirely on the autopsy performed by Dr. Corinne L. Fligner.

Defendants arguments are without merit. An individual may qualify as an expert under Fed. R. Evid. 702 by knowledge, skill, experience, training or education. Mr. McBride and Ms. Murren have attached to their affidavits either a copy of their resume or a statement regarding their qualifications.

Mr. McBride's resume indicates that he was a police officer for almost 18 years, during which time his duties included considerable training and supervising activities, including supervision of a multi-jurisdictional drug unit. His training as a police officer included numerous courses in various kinds of law enforcement. The court is convinced that Mr. McBride's knowledge, skill, experience and training all qualify him as an expert under Rule 702 for the purpose of offering his opinion regarding the reasonableness of defendants' actions during the execution of the search warrant. That defendants can offer affidavits refuting Mr. McBride's opinions does not go to his qualification as an expert, rather defendants' affidavits affect the weight of Mr. McBride's expert testimony.

Ms. Murren states in her affidavit that she has had training in the analysis of bullet trajectory and previously has been qualified as an expert in this area. She has been employed as a forensic scientist since 1975, first by the Washington State Patrol Crime Laboratory System and now with her own forensic services company. Ms. Murren's resume also refers to her practical experience dealing with bullet trajectory and with crime scene reconstruction. The court again is convinced that Ms. Murren's knowledge, skill and experience qualify her as an expert under Rule 702 for the purposes of discussing the position of Mr. Bascomb's body at the time he was shot. Again, the fact that defendants have submitted affidavits that refute the testimony set forth in Ms. Murren's affidavit goes to the weight of this evidence, not its admissibility. Accordingly, defendants' motion to strike the affidavits of Robert McBride and Carol Murren will be denied.

B. Standard of Review on Motions for Summary Judgment

A grant of summary judgment is appropriate if it appears, after viewing the evidence in the light most favorable to the opposing party, that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See, e.g., T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Association,* 809 F.2d 626, 630-631 (9th Cir. 1987); *Lew v. Kona Hospital,* 754 F.2d 1420, 1423 (9th Cir. 1985). Summary judgment is not appropriate if "a result other than that proposed by

the moving party is possible under the facts and applicable law." *See Aronsen v. Crown Zellerbach,* 662 F.2d 584, 591 (9th Cir. 1981), *cert. denied,* 459 U.S. 1200 (1983).

C. Cross-Motions for Summary Judgment on Issue of Qualified Immunity

"Government officials performing discretionary functions . . . are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 818 (1982). Government officials are presumed to have knowledge of clearly established law and to be able to act reasonable with respect to that law. A determination of whether the qualified immunity doctrine applies in a particular case focuses on two inquiries: (1) whether the constitutional rights allegedly violated were clearly established at the time of defendants' conduct; and (2) whether defendants' conduct was objectively reasonable with reference to the clearly established law.

The operation of these standards interacts with the level of generality at which plaintiff's rights are identified. *Anderson v. Creighton, et al.,* 483 U.S. 635, 639 (1987). As the Supreme Court stated in *Anderson,*

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. That is not to say that an official actor is protected by qualified immunity unless the very action in question previously has been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. at 640.

Finally, the issue of qualified immunity ordinarily is one that "should be decided by the court long before trial." *Hunter v. Bryant*, 112 S.Ct. 534, 537 (1991). Qualified immunity precludes litigation, it is not merely a defense against liability. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

Plaintiffs allege that Mr. Bascomb's clearly established rights were violated both when the Anti-Crime Team executing the warrant did not follow the knock and announce statute, 18 U.S.C. § 3109, and when Officer Lisoski used unreasonable force in shooting Mr. Bascomb.[1]

Defendants response to twofold. First they argue that the rights asserted by plaintiffs were not clearly established. Second, they argue that Officer Lisoski's actions were objectively reasonable.[2]

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[1] Plaintiffs originally also allege that Mr. Bascomb's Fourteenth Amendment due process rights were violated when the ACT unit's execution of the search warrant placed Mr. Bascomb in a dangerous situation immediately prior to his being shot by Officer Lisoski. In their reply memorandum, plaintiffs acknowledge that based on recent Supreme Court and Ninth Circuit case law, excessive force claims are to be analyzed solely under the Fourth Amendment. *See* Reply Memorandum in Support of Plaintiffs' Motion for Summary Judgment, at 13 n.6, *citing Graham v. Connor*, 490 U.S. 386 (1989); *Ward v. City of San Jose*, 948 F.2d 1097, 1102 (1991). Accordingly, plaintiffs now agree that their "dangerousness" claims should be folded into the Fourth Amendment reasonableness inquiry.

[2] Defendants have objected to the submission of plaintiffs' Reply Memorandum in Support of Plaintiffs' Motion for Summary Judgment, and in Opposition to Defendants' Motion for Summary Judgment, Re: Qualified Immunity, filed on February

1. Clearly Established Rights

   a. Unreasonable Seizure Through Use of Excessive Force

Under the Fourth Amendment, individuals have a right to be free from unreasonable seizures. The reasonableness of a particular seizure is determined by balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing government interests at stake." *See Graham v. Connor,* 490 U.S. 386 (1989). Defendants argue that,

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6, 1992. Defendants protest that plaintiffs were not entitled to address defendants' motion for summary judgment in this memorandum because plaintiffs previously had filed a memorandum in opposition.

Defendants' objection is without merit. Although Local Rule CR 7(b) ordinarily permits only a moving memorandum, an opposition memorandum and a reply memorandum, the posture in which this issue has been brought before the court necessitates some minor adjustments. In its opposition to defendants' motion for summary judgment on this issue, plaintiffs' [sic] also moved for summary judgment. Thus, at this point, although there were two pending motions for summary judgment, they addressed the same issue. In such cases, it is not unusual for a party to address both motions in a single memorandum. As defendants freely admit, they have filed three memoranda on this issue. The February 6 filing by plaintiffs was only their second memorandum on this issue. In an effort to permit the parties to fully address this issue – on which they have both moved – the court is not going to strike or disregard the portions of plaintiffs' second memorandum that use the language "opposition to defendants' motion". The motions address the same issue and are too clearly related to engage in such a process of selecting which portions of a memorandum are properly filed.

contrary to the admonishment of *Anderson*, plaintiffs have asserted their constitutional right in an overly broad manner. Through a reference to *Finnecan v. Fountain*, 915 F.2d 817 (2d Cir. 1990), defendants appear to make the argument that in order to assert a clearly established constitutional right of freedom from use of unreasonable force, plaintiffs must assert that the particular actions of Officer Lisoski were unconstitutional, i.e., an unreasonable search and seizure in violation of the Fourth Amendment. In *Finnegan*, the Second Circuit held that it was insufficient under the clearly established right inquiry to assert merely that a law enforcement officer used unconstitutionally excessive force. *Id.* at 823. That court held that under *Anderson*, even if the jury were to determine that the law enforcement officer did use excessive force, the trial court must still determine whether the unconstitutionality of his actions should have been apparent to the officer. *Id.* at 823-24.

Plaintiffs' assertion of a clearly established constitutional right here is not in conflict with either *Finnegan* or *Anderson*. This court concludes that plaintiffs have asserted a clearly established constitutional right with sufficient particularity when they allege that Officer Lisoski's shooting Erdman Bascomb violated his Fourth Amendment right to be free from use of unreasonable force. When a law enforcement officer shoots an individual, he has "seized" the individual for purposes of the Fourth Amendment. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985); *Reed v. Hov.* [sic] 891 F.2d 1421, 1426 (9th Cir. 1989). In addition, use of deadly force to seize an unarmed individual is, in most circumstances, unreasonable. *Garner*, 471 U.S. at 13.

In *Garner*, the Supreme Court applied the Fourth Amendment reasonableness balancing test and found that the individual's interest in not being seized through deadly force is unmatched and that use of deadly force also frustrates society's interest in determination of guilt or innocence. *Id.* at 9. In the context of preventing a fleeing felon from escaping, the court stated that use of deadly force would be constitutional only where the suspect threatens the officer with a weapon, or where there is probable cause to believe the suspect has committed a crime involving the infliction or threatened infliction of serious harm. *Id.* at 11. Erdman Bascomb did not have a weapon, nor was there probable cause to believe that he had committed a crime involving infliction of harm. Whether Officer Lisoski's actions were nonetheless objectively reasonable is a separate element of determining whether Officer Lisoski is immune from liability.

The Supreme Court decided *Garner* in 1985, more than two years prior to Erdman Bascomb's death. Law enforcement officers are expected to be abreast of constitutional law developments. Accordingly, the court finds that Erdman Bascomb's constitutional right to be free from an unreasonable seizure through use of deadly force was clearly established on February 18, 1988.

b. Knock and Announce Statute

Defendants argue that regardless of whether the ACT members should have known that their actions violated clearly established law, the knock and announce statute, Officer Lisoski did not participate in the knock and announce portion of executing the warrant, and his entry

into the apartment was objectively reasonable. Thus, for purposes of this motion and without making a finding regarding whether the ACT members violated the knock and announce statute, the court will assume that plaintiffs sufficiently allege violation of a clearly established right. The reasonableness of Officer Lisoski's actions in entering the apartment will be addressed below.

2. Objective Reasonableness

The second prong of the qualified immunity analysis examines whether, in light of clearly established law, Officer Lisoski's actions were objectively reasonable.

a. Collateral Estoppel Effect of Inquest Jury Findings

Defendants first argue that the decision of the inquest jury exonerating Officer Lisoski precludes a different finding by this court. In *Shoemaker v. Bremerton*, 109 Wn.2d 504 (1987), the Washington Supreme Court concluded that factual findings of the Bremerton Civil Service Commission precluded a federal civil rights action based on the conduct already addressed by the Commission. Based on this decision, defendants argue that this court should apply collateral estoppel to the factual finding of the inquest jury that Officer Lisoski reasonably feared for his own safety. Defendants' Reply Memorandum in Support of Summary Judgment at 7.

Defendants' collateral estoppel argument is unpersuasive Application of the doctrine of collateral estoppel requires: (1) identity between the issue decided in the

prior adjudication and the issue in question in the current litigation; (2) a final judgment on the merits in the prior adjudication; (3) that the party against whom the moving party seeks to assert collateral estoppel be a party or in privity with a party to the prior adjudication; and (4) that the application of the doctrine not work an injustice on the party against whom it is asserted. *Shoemaker,* 109 Wn.2d at 507-08. Regardless of whether defendants would be able to establish identity of issues and parties, collateral estoppel does not apply in this case because it is unclear that the decision of the inquest jury is a final "judgment" on the merits and because this court determines that application of collateral estoppel would work an injustice on plaintiffs.

In giving preclusive effect to the Bremerton Civil Service Commission finding in *Shoemaker,* the Washington Supreme Court focused on the procedural protections given to plaintiff during the Commission proceedings and the similarity of the issues and parties at both proceedings. *Shoemaker,* 109 Wn.2d at 508-11. There are several differences between the procedures used by the Bremerton Civil Service Commission in *Shoemaker* and procedures used by the inquest jury here. First, in *Shoemaker* in the proceeding before the Bremerton Civil Service Commission, the plaintiff was represented by the same attorney who represented him in his civil rights action. In addition, plaintiff's counsel was permitted to cross-examine opposing witnesses, to present witnesses, to compel attendance of any witnesses she felt had relevant information, and to make opening and closing arguments. Second, Shoemaker had the opportunity to appeal the Commission's decision to Superior Court and to ask

the Commission for reconsideration. *Shoemaker,* 109 Wn.2d at 509-10. In *Bremerton,* plaintiff essentially sought a different forum for an identical claim.

In this case, although counsel from plaintiffs' current law firm was able to participate in the inquest proceedings, he had few of the same procedural opportunities. Although he was able to cross-examine witnesses, he did not have control over the evidence presented, he could not compel attendance of witnesses, and he could not make an opening or a closing argument. In addition, the family had no opportunity to appeal or to seek other review of the inquest jury's findings. *See* Affidavit of David Allen Re: Inquest, ¶¶ 3, 4, 7. Finally, the inquest judge declined to give an instruction submitted by plaintiffs' counsel on the knock and announce requirement. *Id.*, ¶ 6.

On the basis of the limited nature of plaintiffs' participation in the inquest proceedings, the court concludes that the inquest jury's finding of reasonableness does not preclude this court from revisiting that issue to determine whether Officer Lisoski is entitled to immunity from suit because his actions were objectively reasonable as a matter of law. While the factual findings of the inquest jury may be and have been, considered by this court, they are not dispositive.

b. Reasonableness of Use of Deadly Force

Second, defendants argue that Officer Lisoski's decision to shoot when faced with what he believed to be an

armed individual turning toward him was objectively reasonable.

In a recent decision, *Hunter v. Bryant*, 302 US ___, 116 L.Ed 589, 112 S.Ct. 534 (1991), the Supreme Court held that the Ninth Circuit erred in determining that qualified immunity should be granted at the summary judgment stage only where there is only one reasonable conclusion that a jury could reach. The Supreme Court instead emphasized that qualified immunity ordinarily should be decided long before trial and should not routinely be placed in the hands of the jury. *Id.* at 537. The Supreme Court further stated that in deciding a question of qualified immunity, a court "should ask whether the [government officers] acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact." *Id.*

Under *Hunter*, and as defense counsel urged this court to do at oral argument, the court essentially is required to apply a different standard to a qualified immunity summary judgment determination than it would on other summary judgment motions.[3] *Hunter* essentially requires the court rather than the trier of fact to make the reasonableness determination. In cases where factual disputes underlie the reasonableness determination, this standard places the court in a bit of a conundrum. Certainly, the Supreme Court could not have intended the trial court to resolve all questions of fact

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[3] Justice Scalia concurring in judgment and Justice Stevens dissenting both stated that the regular summary judgment standard should be used in determining qualified immunity.

before ruling on a motion for summary judgment based on qualified immunity. Such a procedure would completely usurp the province of the jury. In addition, in cases where the court, after complete development of the facts, were to conclude that the government officer's actions were not objectively reasonable, the court would be resolving the merits of the action in plaintiffs' favor.

The Ninth Circuit and other appeals courts have offered a different approach where the inquiry on the merits, as well as the inquiry on qualified immunity, is one of the reasonableness of the government officer's conduct. *See Hopkins v. Andaya*, 958 F.2d 881, No. 89-16368, at 1835 n.3 (9th Cir., March 24, 1992); *Curnow v. Ridgecrest Police*, 952 F.2d 321 No. 90-15314 (9th Cir. Dec. 26, 1991); *Hunter v. District of Columbia*, 943 F.2d 69, 75 (D.C. Cir. 1991). In these cases, all involving § 1983 claims based on use of unreasonable force, the courts applied traditional summary judgment standards. In the most recent Ninth Circuit case, *Hopkins*, the court on summary judgment analyzed the summary judgment motion solely on the merits of whether the government officer had used unreasonable force, addressing qualified immunity only in a footnote. *Hopkins*, slip op. at n.3. Thus, where there are genuine questions of material facts on the merits in an unreasonable force case, a grant of summary judgment based on qualified immunity is inappropriate.

Additionally, the case before this court is distinguishable from *Hunter* in several significant respects. In *Hunter*, the question was whether two Secret Service agents could reasonably believe that, under existing law, they had probable cause to arrest the plaintiff for making threats against the president of the United States. Courts are

accustomed to making probable cause determinations, and, in fact, in *Hunter* a United States Magistrate Judge agreed at an arraignment that probable cause existed to hold plaintiff for threatening the life of the president. In this case, however, the court is being asked to assess whether Officer Lisoski used reasonable force, a determination that juries, not courts, customarily make.

Furthermore, in *Hunter* the facts were uncontested. Hare, [sic] however, plaintiffs have disputed several facts related to the reasonableness of the force used by Officer Lisoski. While, as defendants argue, it may well have been reasonable for Officer Lisoski to fire his weapon once he perceived that an individual in the apartment was raising himself up off the couch and pointing an object toward him, this court must consider *all* of the circumstances. *Garner*, 471 U.S. at 8-9.

There is no doubt that Officer Lisoski shot Mr. Bascomb almost immediately upon observing him. *See* Deposition of Sergeant Patric Parker at 93. He detected only that Mr. Bascomb was moving from his prone position on a loveseat or couch and that Mr. Bascomb had an object in his hand. Deposition of Robert Lisoski at 100-01.[4] He could not detect whether the object was a

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[4] The parties offer quite different versions of the position in which Mr. Bascomb's body was moving at the time Officer Lisoski shot him. Officer Lisoski states that Erdman Bascomb was moving toward him. Deposition of Robert Lisoski at 95-96. Corinne L. Fligner, the pathologist who performed the autopsy on Mr. Bascomb states that the path of the bullet through the body is consistent with a shot being fired from a horizontal plane at a person leaning forward in a sitting position and twisting toward the door. Affidavit of Corinne L. Fligner at 3.

weapon. He had no information that persons in the apartment were armed. The court finds that these facts raised a genuine issue of material fact as to whether Officer Lisoski's actions were reasonable. Defendants' motion for summary judgment based on Officer Lisoski's qualified immunity will be denied on plaintiffs' Fourth Amendment unreasonable force claim.

c. Reasonableness of Entry After Knocking and Announcing Presence

The court concludes, however, that Officer Lisoski's actions in entering the apartment immediately after the door was opened were objectively reasonable and do preclude suit against Officer Lisoski on plaintiffs' claim based on violation of the knock and announce statute. Regardless of the manner in which the ACT members knocked and announced, the court is convinced that a reasonable police officer whose assignment within the group of officers executing the warrant was to enter the dwelling once a means of access had been secured would not wait to perform that assignment while he decided whether the other officers had adequately performed their assignment. *See* Affidavit of Tim Perry at 3. Plaintiffs offer no evidence to counter this assessment.

Carol Murren, plaintiffs' expert, states that based on Officer Lisoski's position inside the apartment that it is her opinion that the path of the bullet is consistent with Mr. Bascomb turning his body *away* from Officer Lisoski. Regardless of the direction that Mr. Bascomb was turning his torso at the time the shot was fired, it appears that he was lifting his body up from the couch.

In summary, defendants' motion for summary judgment on qualified immunity will be denied and plaintiffs' motion for summary judgment of dismissal of the qualified immunity defense will be granted as to plaintiffs' Fourth Amendment unreasonable seizure claim. Defendants' motion will be granted as to plaintiffs' Fourth Amendment claim based on defendants' alleged violation of the knock and announce statute.

D. Municipal Liability

A municipality may be held liable under 42 U.S.C. § 1983 for official policies or customs that result in the deprivation of rights. *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978). Plaintiffs allege that the City of Seattle, through its police department, is liable for violation of Erdman Bascomb's rights on two bases. First, plaintiffs allege that the Seattle Police Department maintained unlawful customs and practices in the execution of search warrants. Second, plaintiffs allege that the Seattle Police Department had a custom or practice of inadequate training, supervision and discipline of officers participating in Anti-Crime Teams ("ACT") and that this custom or practice amounted to deliberate indifference to the rights of those individuals with whom members of the ACT came into contact.

Defendants argue that the facts alleged by plaintiffs are inadequate as a matter of law to show an unlawful custom or practice attributable to the city. Specifically, defendants argue that each of the incidents alleged by plaintiffs to be part of the unconstitutional practices or

customs were thoroughly reviewed by the police department and that training with respect to the execution of search warrants, the use of firearms and for the ACT unite members was adequate.

Both parties present considerable information regarding the execution of various search warrants by the ACT members, the training provided to these officers, the reactions and responses of these officers' supervisors regarding how the ACT officers were executing search warrants, and the opinions of current and former police officers regarding what constitutes proper training and procedure for the execution of search warrants and use of firearms. As the parties dispute the relevance of this information with regard to the legal standards necessary to show municipal liability, the court will address each party's interpretation of the facts in the context of the various showings plaintiffs must make to establish a genuine issue of material fact and preclude summary judgment.

1. Unlawful Custom or Practice in Executing Search Warrants

An official policy or custom within the meaning of *Monell* may be demonstrated by a pattern of conduct by municipal employees. *See McLin v. Chicago*, 742 F. Supp. 994 (N.D. Ill. 1990). To demonstrate that a pattern of conduct rises to the level of an official custom or policy, plaintiffs must show: (1) that a pattern of conduct exists; (2) that the custom or practice is attributable to the municipality; and (3) that the custom was the cause of the constitutional violation. *See Bordanaro v. McLeod*, 871 F.2d 1151, 1156 (1st Cir. 1989) (citations omitted).

a. Existence of Pattern of Conduct

Plaintiffs allege several incidents since 1985 that they claim establish the existence of a Seattle Police Department ACT custom or practice of unlawfully executing search warrants: (1) the first ACT unit, formed in 1985, routinely violated the knock and announce requirement during the execution of search warrant, Affidavit of Charles Pillon, ¶¶ 8-11; (2) officers forced the door open during most searches executed by the second ACT unit, Deposition of Robert Lisoski at 53 (door forced open in more than 50 percent of searches), Deposition of Officer Bailey at 66 (door forced open in 99 percent of searches); (3) on February 2, 1988, an unarmed man, William Tucker, was shot and killed by Officer Michael Henry during the execution of a search warrant when Officer Henry's gun discharged as he tried to establish position inside the door, *see* Affidavit of Todd Maybrown, Exhibit A, at 2 (statement of Michael Henry); (4) on February 4, 1988, two citizens of the South Seattle neighborhood in which William Tucker lived wrote a letter to Seattle City Council members expressing concern about what they considered the unwarranted nighttime execution of search warrants that often resulted in forceful entries into people's homes, *see id.*, Exhibit B, at 1; (5) on April 7, 1987, Officer Al Thompson accidentally discharged his weapon when he became tangled in a wire from a screen door that he and another officer had just forced open during the execution of a narcotics-related search warrant; (6) on October 17, 1987, during the nighttime execution of a search warrant, Officer Landy Black fired his weapon at a shirt hanging on a curtain rod, explaining afterward that in the darkness he thought the item he fired at was a tall person

lunging toward him, *see id.*, Exhibit D, at 1 (statement of Landy Black);[5] (7) a KIRO-TV news videotape of ACT II members executing two search warrants on February 6, 1988, showing officers breaking down the door without satisfying the knock and announce requirement, Affidavit of Charles Pillon, Appendix D; and (8) a February 9, 1988, letter from Mr. Pillon to Chief Fitzsimons expressing concern over incidents of officers discharging their guns during the execution of search warrants. Affidavit of Charles Pillon, Appendix C.

Defendants argue that these incidents do not establish a custom, practice or pattern of conduct. First, they argue that plaintiffs have listed too few incidents to establish a pattern of conduct. Second, they argue that the ACT officers were trained specifically in the requirements of the knock and announce statute. Affidavit of Diane Libby, Exhibit 1, Deposition of Michael R. Germann, at 51, 55. Third, they argue that the William Tucker shooting incident did not involve the knock and announce requirement at all because the officers had been invited into that residence. *Id.*, Exhibit 7, Excerpts from Transcript of Proceedings of Inquest re William Tucker, Volume I, at 66-68. Fourth, defendants argue that the KIRO videotape of searches executed on February 6, 1988, is an incomplete record of the knock and announce procedure, and that the officers executing those searches have stated that they were not routine, in part because they were disrupted by

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[5] These last two incidents were reported in a February 7, 1988, article in the *Seattle Times*. In the October 17, 1987, incident, two children slept on mattresses near the curtain rod at which the officer fired.

the camera crew. Deposition of Officer Barker, at 84-87; Deposition of Robert Lisoski, at 81. Finally, defendants argue that it is not a violation of rights to execute a search warrant at night or to execute multiple search warrants in the same evening.

The court finds that the multiple incidents identified by plaintiffs raise a genuine issue of material fact regarding whether the Seattle Police Department ACT officers engaged in an unconstitutional pattern of conduct in the execution of narcotics-related search warrants.

b. Custom or Practice Attributable to Municipality

For a custom or practice to be attributable to the municipality, plaintiffs must show that an individual with decision or policy-making authority had knowledge of the custom or practice. *See Bordanaro,* 871 F.2d at 1157. Constructive knowledge may be shown by "evidence of the fact that the practices have been so widespread or flagrant that in the proper exercise of [their] official responsibilities the [municipal policymakers] should have known of them." *Spell v. McDaniel,* 1880, 1887 (4th Cir.), *cert. denied* 108 S.Ct. 752 (1988) [sic].

Defendants do not dispute that Chief Fitzsimons is the city's official policymaker responsible for law enforcement decisions, including how search warrants are to be executed. Plaintiffs argue that Chief Fitzsimons had both actual and constructive knowledge of the custom or policy of unlawful execution of search warrants.

Plaintiffs argue that Chief Fitzsimons had actual knowledge from the letter sent to the Seattle City Council, from the KIRO videotape, which he states he has viewed, from the various memoranda and letters sent by Charles Pillon, and from comments made by Chief Fitzsimons after the death of William Tucker.[6] Plaintiffs argue that Chief Fitzsimons had constructive knowledge because the letters and the KIRO videotape indicate that the practice was "so widespread or flagrant" that Chief Fitzsimons, in the proper exercise of responsibilities, would have known of them.

Defendants argue that Chief Fitzsimons did not have actual knowledge of several of the incidents described by plaintiffs. For example, defendants argue that Chief Fitzsimons did not have knowledge of the February 4, 1988, letter sent to Seattle City Council members Jane Noland and Delores Sibonga. Affidavit of Diane Libby, Exhibit 4, at 12 (Deposition of Patrick Fitzsimons). Defendants further argue that Chief Fitzsimons did not have any information regarding problems with the second ACT, *id.* at 36-37, and that although Chief Fitzsimons was aware from Mr. Pillon of improprieties among the first ACT members, he took measures to investigate these

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[6] According to plaintiffs, after William Tucker was shot, Chief Fitzsimons stated, "It's a drug war and we're going to continue serving search warrants and going after the people who sell drugs." Affidavit of Charles Pillon, Appendix A. Chief Fitzsimons stated that this particular quote was taken out of context in a conversation regarding the duty of the Seattle Police Department to continue to try to arrest narcotics dealers. Affidavit of Diane Libby, Exhibit 4, at 44-46 (Deposition of Patrick Fitzsimons).

improprieties and expressed concerns about having Mr. Pillon follow proper procedures in the future. *Id.* at 16, 20. Defendants again urge the court to look at the manner in which Seattle Police Department officers were trained regarding the knock and announce requirement. Finally, defendants argue that the city cannot be held liable because the only *policy* attributable to the city was the decision to hold a training session for ACT members in December of 1987. *Id.*, Exhibit 12 (Affidavit of Dan Bryant). They state that it was always the clear policy of the city to be in compliance with applicable law. *Id.*, Exhibit 4, at 16.

The court again finds that there is a genuine issue of material fact that precludes summary judgment. Although Chief Fitzsimons states that he expected his officers to comply with the knock and announce requirement, plaintiffs have shown instances in which there was a question whether the officers complied with the knock and announce requirement. Plaintiffs also have shown that Chief Fitzimons was aware of several of these incidents. For example, Mr. Pillon wrote a letter *to Chief Fitzsimons* shortly after the Tucker shooting and prior to the Bascomb shooting expressing his concern with the practices of the second ACT.

c. Causal Link

To support liability under 42 U.S.C. § 1983, a municipal custom must be the "moving force" behind the plaintiff's injury. *Oklahoma City v. Tuttle,* 471 U.S. 808, 819 (1985). There must be some affirmative link between the municipal custom and the constitutional deprivation. *Id.*

at 824-25 n.8. Where officials fail to remedy continued unconstitutional misconduct, such misconduct can be presumed to facilitate similar unlawful actions in the future. *See Brandon v. Holt*, 469 U.S. 464, 467 (1985); *Parker v. District of Columbia*, 850 F.2d 708, 714 (D.C. Cir. 1988). However, where defendants can show that the particular custom or policy was not followed in the situation leading to a plaintiff's injury, there is no causal link between the municipal custom and the plaintiff's injury. *Cf. Bordanaro*, 871 F.2d at 1157.

Defendants argue that even if there was a general practice of not observing the knock and announce requirement, the ACT unit that executed the search warrant at the Bascomb apartment did observe the knock and announce requirement. They argue that, as a result, such a custom or practice was not the moving force behind Erdman Bascomb's death.

The court finds that plaintiffs have raised a genuine issue of material fact regarding whether defendants violated the knock and announce requirement in executing the Bascomb warrant, thereby providing an affirmative link between the alleged municipal custom and violation of Erdman Bascomb's rights. There is considerable conflicting evidence regarding how long the ACT team waited before forcing their way into the apartment after knocking and announcing their presence and whether in fact they actually knocked and announced their presence. The estimates of the police officers range from two to fifteen seconds. Some members of the inquest jury estimated that the entry occurred no more than four seconds

after the knock and announcement. *See* Plaintiffs' Memorandum Re: Qualified Immunity, at 12 n.4. Officer Lisoski himself estimated that the ACT members waited ten seconds before forcing the door open.

In short, plaintiffs have put forth evidence to show that factual issues remain on all three elements of their municipal liability claim that the city had a custom or practice of violating the knock and announce requirement.

2. Inadequate Training, Supervision and Discipline

Inadequate training may form the basis for municipal liability under 42 U.S.C. § 1983 only where the failure to adequately train amounts to deliberate indifference toward the rights of those with whom the police officers come into contact. *Canton v. Harris,* 489 U.S. 378 (1989). A need for action on the part of a municipality may be so obvious that failure to take action could be characterized as deliberate indifference to an individual's rights. *Id.* at 390; *McLin,* 742 F. Supp. at 1002.

In addressing this issue, the court must focus on the adequacy of the training in light of the particular tasks that the officers must perform. *Canton,* 489 U.S. at 390. To affix liability on the municipality, it is insufficient that a particular officer may be unsatisfactorily trained. *Id.* In addition, it is insufficient to show that the injury to plaintiff could have been avoided had the officer had more or better training. *Id.*

Plaintiffs have submitted the affidavits of Charles Pillon and Robert McBride which raise questions about

the adequacy of the firearm and search warrant execution training. Plaintiffs also point to the multiple occasions of firearms discharges that occurred during the execution of search warrants and to the KIRO videotape as evidence. *See Tennessee v. Garner*, 471 U.S. 1 (1985) (need to train officers in the constitutional limits of the use of deadly force is so obvious that failure to do so may be characterized as deliberate indifference).

Defendants argue, on the other hand, that the Seattle Police Department adequately trained all ACT officers both in the use of firearms and in the execution of search warrants, including the knock and announce requirement. They point specifically to the December 1987 training session for ACT members during which officers discussed pre-raid planning and practiced execution of a search warrant on an abandoned building. Affidavit of Diane Libby, Exhibit 12 (Affidavit of Dan Bryant). Defendants further argue that after each of the incidents described by plaintiffs, the Seattle Police Department reviewed the incidents, and, on one occasion implemented a suggestion that the officer involved be required to undergo additional training. *See* Defendants' Reply Brief on Motion for Summary Judgment at 5. Finally, defendants state that there was no policy of inadequate discipline or supervision because it was Chief Fitzsimons' policy and the policy of the Seattle Police Department to emphasize to all officers that they should follow all rules and regulations including the knock and announce requirement. Affidavit of Diane Libby. Exhibit 2, Deposition of Michael Germann, at 75-78.

The court finds that plaintiffs have raised a genuine issue of material fact regarding whether defendants'

inadequately trained, supervised and disciplined ACT officers regarding the execution of search warrants and use of firearms and regarding whether such inadequate training amounted to deliberate indifference to Erdman Bascomb's rights. Finally, the court finds that as with plaintiffs' claim that defendants had an official custom of unlawful execution of search warrants, plaintiffs have raised a genuine issue of material fact regarding whether the inadequate training was attributable to the municipality and whether it was the moving force behind deprivation of Erdman Bascomb's rights. *See supra,* Part C(1)(b), (c).

As genuine issues of material fact remain regarding each of plaintiffs' claims for municipal liability, defendants' motion for summary judgment will be denied.

E. Liability of Chief Patrick Fitzsimons

Chief Fitzsimons is sued both in his individual and in his official capacity. A suit against an individual in his official capacity is to be treated as a suit against the governmental entity. *Kentucky v. Graham,* 473 U.S. 159, 166 (1985). As the law governing municipal liability also governs the liability of an individual sued in his official capacity, the court need not revisit that issue. *See Hutton v. Strickland,* 919 F.2d 1531, 1543 (11th Cir. 1990).

Although there is no liability under 42 U.S.C. § 1983 based on respondeat superior, *Rizzo v. Goode,* 423 U.S. 362, 377 (1976), a government official is liable in his individual capacity if the official plays an affirmative role in the constitutional violations. *See Andrews v. City of*

Philadelphia, 895 F.2d 1469, 1478 (3d Cir. 1990). In addition, a supervisor may be liable for the acts of those he supervises if he has done something, or failed to do something that he should have done, that was a proximate cause of the violation of an individual's rights. *See Johnson v. Duffy*, 588 F.2d 740 (9th Cir. 1978); *Bowen v. Wadkins*, 669 F.2d 979, 986-89 (5th Cir. 1982).

Defendants argue that Chief Fitzsimons cannot be held liable in his individual capacity for two reasons. First, they argue that Chief Fitzsimons is entitled to qualified immunity because a reasonable police chief in his situation would have reasonably believed that the decisions he made were lawful and proper. Second, they argue that plaintiffs have not shown that Chief Fitzsimons was directly involved in or participated in the incidents described by plaintiffs and alleged to have lead to the deprivation of Erdman Bascomb's rights.

1. Qualified Immunity

As defendants raise the qualified immunity issue for the first time in their reply memorandum, the court is not required to address it. However, the court is also convinced that Chief Fitzsimons is not entitled to such immunity. As discussed above, Erdman Bascomb's constitutional right against use of excessive force was clearly established at the time of his death. As with Officer Lisoski's motion for qualified immunity, the reasonableness of Chief Fitzsimons' actions must be left to the jury.

2. Chief Fitzsimons' Involvement in Deprivation of Erdman Bascomb's Rights

Other courts have ruled that chiefs of police have a duty of supervision to correct misconduct of which they have notice. *See, e.g., McClelland v. Facteau,* 610 F.2d 693, 697 (10th Cir. 1979). To establish such supervisory liability, plaintiffs must establish that the supervisor's conduct amounted to deliberate indifference to the constitutional rights of those with whom they come into contact. *Gutierrez-Rodriquez v. Cartagena,* 882 F.2d 553, 562 (1st Cir. 1989). Plaintiffs allege that Chief Fitzsimons played an affirmative role in deprivation of Erdman Bascomb's rights because although he had notice of the misconduct of the ACT members, he did not address the problem by directing additional training or discipline. Plaintiffs further allege that this failure to act amounted to deliberate indifference because Chief Fitzsimons knew, or should have known, that continuation of this misconduct would result in deprivation of constitutional rights.

The court already has addressed at some length the evidence introduced by plaintiffs to demonstrate that Chief Fitzsimons had either actual or constructive knowledge of the activities of the ACT unit members during the execution of search warrants. Plaintiffs here particularly emphasize that Chief Fitzsimons received the letter from Charles Pillon only days after William Tucker was shot and days before Erdman Bascomb was shot. The information presented by plaintiffs is sufficient to establish a genuine issue of material fact regarding whether Chief Fitzsimons exercised his duty of supervision in light of the activities of the ACT members and whether Chief

Fitzsimons alleged failure to adequately supervise deprived Erdman Bascomb of his rights. Accordingly, defendants motion for summary judgment of dismissal of the claim against Chief Fitzsimons in his individual capacity will be denied.

F. Plaintiffs' Motion for Summary Judgment on Affirmative Defenses Nos. 3-6

In their answer to plaintiffs' complaint, defendants asserted six affirmative defenses, including violation of the statute of limitations (No. 3), failure to comply with conditions precedent to filing suit (No. 4), insufficient service of process (No. 5), and self defense (No. 6). Plaintiffs sought to compel from defendants responses to interrogatories seeking to discover the facts upon which these affirmative defenses rest.

This court declined to compel answers to these interrogatories but instructed defendants to notify the court as well as plaintiffs which of these defenses they intended to pursue. In a November 20, 1991, supplemental response to interrogatories, defendants stated that they intended to pursue all of their affirmative defenses at trial or on appeal. Defendants declined to respond to a subsequent letter from plaintiffs requesting that defendants identify which defenses they intended to pursue *at trial. See* Affidavit of Todd Maybrown in Support of Plaintiffs' Motion for Partial Summary Judgment Re: Asserted Defenses, Attachment A, B. Plaintiffs now move for summary judgment of dismissal of defendants' third, fourth, fifth and sixth affirmative defenses.

1. Statute of Limitations Defense

Defendants concede that Plaintiffs' initial complaint dated January 1991 was filed within the three-year statute of limitations applicable to plaintiffs' claims. Nonetheless, defendants argue that their statute of limitations claim should not be dismissed for three reasons. First, they state that they intend to pursue this issue on appeal based on this court's order permitting plaintiffs to amend their complaint to add Erdman Bascomb's parents as plaintiffs.[7] Second, they express concern about plaintiffs' motion to amend their complaint again to add Erdman Bascomb's daughter as a plaintiff.[8] Third, they argue that their statute of limitations defense is necessary should they prevail on their failure to comply with conditions precedent defense. Defendants apparently contend that if the court finds that plaintiffs have failed to properly file a notice of claim for damages with the city as mandated by a city ordinance, plaintiffs may seek to file a proper notice of claim and then bring another action in federal court within sixty days. Defendants contend that any subsequent notice of claim and lawsuit would be well beyond the three-year statute of limitations in this case.

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[7] This court held that although plaintiffs' formal motion to amend came beyond the three-year period, defendants had been on notice for some period of time that plaintiffs would be amending the complaint to add Erdman Bascomb's parents. The court also held that the amendment related back to the original complaint.

[8] Plaintiffs' motion to amend is addressed in a separate order.

These arguments are without merit. This court's prior order granting plaintiffs' motion to amend their complaint to add Erdman Bascomb's parents resolved any statute of limitations issue with respect to Paul, Frank or Flora Bascomb. A grant of summary judgment on this issue will not affect defendants' rights on appeal. Second, the fact that the court may again have to address the statute of limitations issue with respect to plaintiffs' motion to amend the complaint to add Erdman Bascomb's daughter, Ria Shar Caldwell, as a plaintiff, does not preclude the court from determining that the issue is moot with respect to the plaintiffs currently before the court. Third, as discussed below, there is no merit to defendants' failure to comply with conditions precedent defense.

2. Failure to Comply with Conditions Precedent

Seattle Municipal Code 524005 provides that no motion may be commenced against the city for damages until a written notice of claim has been presented to the city comptroller. Under the Seattle City Charter, the claim must be brought within six months of the incident prompting the claim. In addition, the claim must name the claimant and be signed by the claimant or an authorized representative. On July 15, 1988, Paul Bascomb submitted a claim for damages stating that he "will be the personal representative of Erdman Bascomb's estate." Affidavit of Todd Maybrown in Support of Plaintiffs' Motion for Partial Summary Judgment Re: Asserted

Defenses, Exhibit C. Paul Bascomb was named administrator of Erdman Bascomb's estate on November 20, 1990. *Id.*, Exhibit A.

Defendants argue that because only the personal representative of an individual's estate can bring a claim for wrongful death under Washington law, RCW 4.16.080, only the personal representative may be the proper claimant in a wrongful death action under Seattle Municipal Code 524005. Defendants conclude that because Paul Bascomb had not officially been named representative of his brother's estate at the time the notice of claim was filed with the city comptroller, the notice of claim is deficient and plaintiffs have failed to comply with a condition precedent to filing suit. Defendants also point out that Frank and Flora Bascomb were not listed as claimants at all on the notice of claim.

The court notes initially that this defense would have application only with respect to plaintiffs' state wrongful death claim against the city itself and would have absolutely no application to any of plaintiffs' federal civil rights claims or to plaintiffs' claims against individual officers. Failure to comply with state or municipal notice of claims statutes cannot be used to preclude federal civil rights actions. *Felder v. Casey*, 487 U.S. 131, 152-53 (1988) (holding that Wisconsin notice of claim statute is preempted by 42 U.S.C. § 1983). Second, as plaintiffs bring their state wrongful death claim only against Officer Lisoski individually and not against the city, any failure to comply with the claims statute is immaterial to plaintiffs' claims.

Finally, even if this court were to conclude that the Seattle notice of claims ordinance applied to plaintiffs' claims, this court concludes as a matter of law that the claim timely filed by Paul Bascomb on July 15, 1988, sufficiently put the city on notice of plaintiffs' claims against it. Washington courts traditionally have liberally construed state and municipal notice of claims provisions. *See Frasier v. Cowlitz County*, 67 Wash. 312, 314 2(1912). The purpose of a notice of claims ordinance is to permit the city to "investigate the claim and the claimant while the occurrence is recent and evidence available . . . " *Id.* at 314. The claim filed by Paul Bascomb on July 15, 1988, made the city award of the incident for which he had a claim and set forth his claim for damages for "loss of life, earnings, *companionship to parents*, pain and suffering, funeral expenses, and other consequential damages." Reply Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment, Appendix A. In addition, Paul Bascomb stated that he was making his claim as the personal representative of Erdman Bascomb's estate. Thus, defendants clearly were on notice both that Paul Bascomb claimed to be the personal representative for his brother's estate and that it faced a potential claim for liability by Erdman Bascomb's parents.

Accordingly, this court determines that plaintiffs have complied with the Seattle notice of claims ordinance and that plaintiffs are entitled to summary judgment of dismissal of defendants' fourth affirmative defense, failure to comply with a condition precedent.

3. Service of Process

Defendants argue that plaintiffs have failed to properly serve defendant Jane Doe Lisoski or the Lisoski marital community because they have not even attempted service on Officer Lisoski's wife and because they served Officer Lisoski at his place of employment rather than at his home. Defendants concede that Officer Lisoski was served at the South Precinct for the Seattle Police Department on January 28, 1991.

Defendants' service of process argument is without merit. Plaintiffs have named Jane Doe Lisoski as a defendant solely for the purpose of obtaining a judgment against the Lisoski marital community. Under Washington law, service of process on either spouse is sufficient to support a judgment on a community obligation. *See, e.g., Oil Heat Co. of Port Angeles, Inc. v. Sweeney,* 26 Wn.App. 351, 356 (1980). Defendants present no authority to the contrary. Accordingly, plaintiffs' motion for summary judgment of dismissal of defendants' fifth affirmative defense will be granted.

4. Self Defense

Defendants argue that self defense is an affirmative defense to plaintiffs' pendent wrongful death claim under Washington law and must be specifically plead. *See* RCW9A.16.020, *et seq.;* Fed. R. Civ. P. 8(c). Defendants do not assert self defense with respect to any of plaintiffs' federal civil rights claims. Plaintiffs argue, however, that self defense is not a defense to a negligence claim. *See generally* 65A C.J.S. Negligence § 181 (discussion of

proper defenses to a negligence claim does not include self defense). Plaintiffs also suggest that Washington courts recognize only two affirmative defenses to a negligence claim, assumption of risk and comparative negligence. *See, e.g., Kirk v. Washington State University,* 109 Wn.2d 448 (1987); *see also Taylor v. Burlington Northern Railroad Co.,* 787 F.2d 1309, 1316-17 (9th Cir. 1986).

This court agrees that self defense is not a valid defense in this context. RCW 9A.16.020, *et seq.,* discusses self defense and justifiable killing only in the context of criminal cases. None of the cases annotated at the end of the statute discuss use of self defense as a defense in a negligence action. Accordingly, the court concludes as a matter of law that self defense is not an affirmative defense available to defendants on plaintiffs' state wrongful death claims and will grant plaintiffs' motion for summary judgment of dismissal of defendants' sixth affirmative defense.

III. CONCLUSION

It is hereby ORDERED, ADJUDGED and DECREED that:

(1) defendants' motion to strike the affidavits of Carol Murren and Robert McBride is DENIED:

(2) defendants' motion for summary judgment on the issue of the qualified immunity of Officer Robert Lisoski is GRANTED only with respect to plaintiffs' claim based on violation of the knock and announce statute, 18 U.S.C. § 3109;

(3) defendants' motion for summary judgment on the issue of the qualified immunity of Officer Robert Lisoski is DENIED with respect to plaintiffs' Fourth Amendment claim based on Erdman Bascomb's right to be free from an unreasonable seizure;

(4) plaintiffs' motion for summary judgment of dismissal of Officer Lisoski's qualified immunity defense is GRANTED only with respect to their Fourth Amendment claim based on Erdman Bascomb's right to be free from an unreasonable seizure;

(5) defendants' motion for summary judgment of plaintiffs' municipal liability claim under 42 U.S.C. § 1983 is DENIED;

(6) defendants' motion for summary judgment of dismissal of the claims against Chief Patrick Fitzsimons is DENIED; and

(7) plaintiffs' motion for summary judgment of dismissal of defendants' third, fourth, fifth and sixth affirmative defenses is GRANTED.

DATED at Seattle, Washington this 23rd day of April, 1992.

/s/ Barbara J. Rothstein
BARBARA J. ROTHSTEIN
CHIEF UNITED STATES
DISTRICT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL A. BASCOMB, as Personal Representative of the Estate of Erdman Bascomb, et al., Plaintiffs-Appellees, vs. CITY OF SEATTLE, et al., Defendants-Appellants.	No. 92-35436 DC# CV-91-51-BJR Western Washington (Seattle) ORDER (Filed June 23, 1992)

The record reveals a possible jurisdictional defect in the appeal. *See Velasquez v. Senko*, 813 F.2d 1509 (9th Cir. 1987) (denial of claim of qualified immunity not appealable where bound up with disputed factual issue).

The jurisdictional issue shall be addressed either by appellees in a motion to dismiss the appeal, or, if no motion to dismiss is filed, by appellants in their opening brief.

For the Court:

/s/ Meg Gerrity
Meg Gerrity
Motions Attorney/Deputy Clerk
Local Rule 27-7

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL A. BASCOMB, as Personal Representative of the Estate of Erdman Bascomb, et al., Plaintiffs-Appellees, vs. CITY OF SEATTLE, et al., Defendants-Appellants.	No. 92-35436 DC# CV-91-51-BJR Washington (Seattle) ORDER (Filed Sept. 21, 1992)

Before: GOODWIN, D.W. NELSON and REINHARDT, Circuit Judges

Appellees' motion to dismiss the appeal is granted. *See Valasquer v. Senko*, 813 F.2d 1509 (9th Cir. 1987) (denial of claim of qualified immunity not appealable where bound up with disputed factual issue).

Supreme Court, U.S.
FILED
MAR 16 1992
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NO. 92-1089

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

CITY OF SEATTLE, ET AL.,

Petitioners,

v.

PAUL A. BASCOMB, ET AL.,

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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I. INTRODUCTION

The respondents, Paul A. Bascomb, Frank Bascomb, Sr. and Flora O. Bascomb, request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's order in this case.

II. STATEMENT OF FACTS

A. FACTUAL BACKGROUND

1. The Shooting of Erdman Bascomb

During the afternoon of February 16, 1988, a Seattle Police Department ("SPD") informant allegedly purchased a small quantity of cocaine from a "black male in his mid twenties"[1] at the apartment located at 3610 36th Ave. S, Apartment C, in Seattle, Washington ("Apartment"). See CR 61 (Inq. Tr. Vol. II, 17-27). The following day, SPD obtained a warrant to search the Apartment. At approximately

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[1] This was not Erdman Bascomb, for Erdman was forty-one years of age at the time of this incident.

11:45 p.m., more than twelve hours after obtaining the warrant, and over 30 hours after the alleged purchase of narcotics, officers of the SPD South Precinct Anti-Crime Team ("ACT II") travelled to the Apartment to execute the warrant. Upon reaching the threshold of the Apartment, Officers Ron Murray and Roger Rusness broke down that door with a battering ram. Petitioner Officer Robert Lisoski immediately entered the Apartment with his gun drawn and saw a person, Erdman Bascomb, lying on a couch in the living room watching television. Erdman, an Army veteran who was working as a longshoreman, was unarmed and posed no threat to the police officers. Nevertheless, less than one second after entry, Lisoski shot and killed Erdman Bascomb.

Three individuals who were in an apartment next door to the Bascomb Apartment heard the police break down the

door and enter the Apartment. They have stated that the police did not knock, announce their presence, request admission or wait any period of time before breaking down the door. According to these witnesses, the police broke down the door without any warning or opportunity for Erdman to answer. CR 59 (Wilson Statement at para. 6; Muldrow Statement at para. 3); Johnson Statement at paras. 6 and 8); CR 61 (Inq. Tr. Vol. III, 107, 130, 150-152, Vol. IV, 42-44; Vol. V, 95-96).

While the police officers and two newspaper employees who were accompanying the officers on the raid claim that the police knocked and announced, by their account the wait was at most a few seconds. Murray, one of the officers holding the battering ram, stated that he waited only one to two seconds before breaking open the door. See CR 61 (Inq. Tr. Vol. II, 155). All police officers

agreed that there were no "exigent circumstances" and that they possessed no objective information prior to the raid suggesting that the occupants would be armed or dangerous, or that the occupants would try to escape or destroy evidence. The State's informant provided no information that there might be firearms within the Apartment. See CR 61 (Inq. Tr. Vol. II, 12). No one heard any sound from inside the Apartment after the police claim they knocked and announced. See CR 61 (Inq. Tr. Vol. III, 22). Neither Lisoski, nor any other officers, all of whom stood listening for the sounds of running, screaming, flushing toilets or other indications that the occupants were trying to escape or destroy evidence, heard any noise within the Apartment. See CR 61 (Inq. Tr. Vol. III, 22-23). Lisoski knew of no reason why the officers could not have knocked and announced a second

time, or waited longer, before breaking down the door. Furthermore, Lisoski conceded that it is quite advantageous to police officers if the occupants answer the door. See CR 61 (Inq. Tr. Vol. III, 34-35).

After the officers broke down the door with a battering ram, Lisoski took approximately two steps into the Apartment and claims that he saw movement and what looked like an arm extending out from a person's body. See CR 61 (Inq. Tr. Vol. III, 174). Lisoski immediately fired his weapon and killed Erdman Bascomb. See CR 61 (Inq. Tr. Vol. III, 175). Lisoski provided no warning before shooting at Erdman. He never stated "drop it" or similar words which would have avoided the shooting. See Lisoski Dep. at 98.

The Apartment was dark when Lisoski went through the door. Lisoski, who was not carrying a flashlight, could not

identify any features of the person he shot. He could not tell whether the person was male or female, nor could he distinguish any object in the person's hand. See Lisoski Dep. at 101. Erdman was unarmed and helpless; he posed no threat to these officers.[2]

Lisoski claims that Erdman was moving off the couch and that his right leg was off of the couch, as if he were going to stand, at the time of the shooting. This

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[2] Petitioners note that the inquest jury concluded that Lisoski's actions were reasonable. This is of no legal significance. As explained by the district court, the Bascombs had little opportunity to participate in the inquest proceedings. They could not call witnesses, they could not argue their case to the jury, requested instructions regarding the requirements of the knock and wait rule were not given and there was no right of appeal from the inquest jury's advisory verdict. See Petition App. 12-13; CR 86 (Allen Affidavit re: Inquest). Furthermore, some jurors were quite troubled by the conduct of these police officers. See id. Petitioners do not challenge the district court's holding regarding this issue.

claim was rebutted by a police officer and newspaper reporter, both of whom entered the Apartment immediately after the shooting and observed Erdman's body with both feet on the couch. See CR 61 (Inq. Tr. IV, 109; Inq. Tr. Vol. V, 64-65). A reconstruction of the shooting by a well qualified criminalist establishes that Erdman was turning his body away from Lisoski, in a defensive manner, at the time he was shot. See CR 64 (Murren Aff.).

Erdman Bascomb made a dying declaration after he was mortally shot by Lisoski. He asked the officers, "what's going on?" or "why did you do it?" See CR 61 (Inq. Tr. Vol. V, 63). Moments later, Erdman died.

2. Petitioner Fitzsimons' Policy of Inaction

In 1985, SPD created its first Anti-Crime Team ("ACT I") to provide community-

based enforcement in the South Precinct in Seattle, with its primary emphasis on narcotics-related offenses. ACT I executed numerous search warrants during 1985 and 1986, even though its officers received little or no training regarding the execution of warrants and related topics. See CR 47 (Pillon Aff. at Paras. 8-11). Consistent with SPD's customs and standard practices, ACT I's officers routinely violated the knock and wait rule when executing warrants. See CR 47 (Pillon Aff. at Para. 7).

Recognizing the problems associated with SPD drug raids, the head of ACT I, Sgt. Charles Pillon, wrote a memorandum to his supervisor during April 1986. Sgt. Pillon explained:

> One factor among others troubles me. It is the level of force and violence which now seems to be acceptable in making entries and confronting suspects found in places raided. I know of abuses which have occurred. And

> the inherent danger in utilizing personnel who are not familiar with the subjects to be encountered, rushing about with guns drawn, manhandling people, should be obvious.
>
> . . .
>
> In the face of this then, it seems ill-advised, if not irrational for the police to introduce violence as a tactic. More violence is the likely result when you mix the unstable types who populate the drug scene, firearms, and police from outside the precinct (the Tactical Squad) in these encounters.
>
> In summary it seems cynical as well. A Police Captain, and two members of the Tactical Squad have confided to me that the purpose of these "commando entries" is "practice" for the Tactical Squad and "show" for the neighbors. The community is no place to practice. And "show" is no viable long term tactic.

See CR 94 (Pillon Supp. Aff. at Attachment A). Sgt. Pillon addressed these very same concerns to Petitioner Chief Fitzsimons sometime in 1986. See CR 94 (Pillon Supp. Aff. at Para. 3).

SPD formed a second ACT in the South Precinct in 1987, ACT II. The team did little more than execute narcotics-related search warrants, serving more than 200 warrants during the ten months prior to the shooting of Erdman Bascomb. Almost all warrants were executed during the evening, and many of these were executed during the late evening hours. The officers frequently served many warrants during the same evening.

In most searches, ACT II's officers broke down doors. See CR 62 (Bailey Dep. at 66 (99 percent); Germann Dep. 83-84 ("high 80's, low 90's percentile")). The City provided ACT II with a battering ram to use in this practice. ACT II's officers routinely violated the knock and wait requirement when executing warrants. See CR 47 (Pillon Aff. at Para. 13-14).

During the two weeks prior to the shooting of Erdman, ACT officers were

involved in numerous incidents which showed that warrants were being executed in a reckless fashion. Whether viewed separately or as a whole, these incidents provided notice that remedial action was badly needed.

a. The Shooting of William Tucker

On the evening of February 2, 1988, William Tucker was shot and killed by Michael Henry, an officer with SPD's East Precinct ACT, during the execution of a search warrant. Off. Henry explained:

> As I entered the door I moved quickly to the left in a shuffling motion. I was stepping down with my left leg. As the left leg hit the floor it jarred me and my gun discharged.

See CR 96 (Maybrown Aff. Ex. A, Henry Statement at 2). Tucker, who was unarmed and had been kneeling on the floor, was killed by the officer's bullet. This incident was widely reported in the news media. See CR 47 (Pillon Aff. at Para.

16). After learning of this incident, Fitzsimons stated: "It's a drug war and we're going to continue serving search warrants and going after the people who sell drugs." CR 47 (Pillon Aff. App. A).

b. Letter to the Seattle City Council

On February 4, 1988, two members of a local community organization wrote Seattle City Council members to express concerns regarding the activities of the ACTs. Discussing the Tucker raid, they wrote:

> This was the third police raid on these premises in recent weeks in a manner demanded by Patrick Fitzsimons which clearly places his officers and the public in great jeopardy of injury or death such as this.
>
> The forceful entry in the night-time of these places by police officers may not be in uniform, and the darkness itself, exacerbate the risk for all.
>
> Our major concern is that a more peaceful, civilized and equally effective means of confronting people in these places was articulated and practiced under Romero Yumul's

> direction by South Precinct personnel as indicated in documents we have enclosed. [Chief of Police] Fitzsimons effectively destroyed these strategies by insisting that confrontations be done only by search warrant, or at least in the majority of cases, and thereby led us to a tragedy such as this.

CR 96 (Maybrown Aff. Ex. B at 1). After discussing Sgt. Pillon's April 1986 memo, these citizens articulated very specific concerns regarding the training and supervision of SPD's ACTs:

> Fitzsimons has forced this incredible problem to be the burden of a very few officers in the anti-crime teams. The fatigue, stress, and confusion these few suffer clearly escalate the risks of mistakes such as this. . . . [T]here is a clear pattern of assigning young, inexperienced officers to the very high crime and otherwise sensitive areas of this city. These officers have to rely on one another for direction and back-up, even as they attempt to learn the skills they should obtain from more experienced partners. We have it from good authority, also, that training officers at the Police Academy are very

> concerned about the low level of fire arms expertise that is common to these young officers because of the burden on training officers and the apparent indifference of the Chief.

CR 96 (Maybrown Aff. Ex. B at 2).

c. Seattle Times News Article

On February 7, 1988, the Seattle Times published a front-page news article entitled: "Seattle Police Acknowledge other Shooting Accidents." See CR 46 (Pillon Aff. App. B). This article described two incidents, in addition to the Tucker incident, during which SPD officers improperly discharged their handguns during the execution of narcotics-related search warrants.

The first discharge occurred when ACT II was serving a warrant on the evening of April 7, 1987. See CR 96 (Maybrown Aff. Ex. C). There, the officers who were assigned to force open the door to the apartment hit the screen and solid door

with the ram. As they passed into the apartment, the officers became tangled in a wire from the screen.[3] One officer's firearm inadvertently went off and the bullet just missed the head of a lieutenant who was overseeing the raid.

The second discharge occurred when the East ACT was serving a warrant on the evening of October 17, 1987. See CR 96 (Maybrown Aff. Ex. D). During the search, Off. Landy Black entered a darkened room and fired at a shirt hanging on a curtain rod. Off. Black explained that he thought that the shirt was a suspect lunging at him. See id. Two children were sleeping on a mattress located just next to this shirt. See id.[4]

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[3] The police officers' statements do not indicate that the officers knocked, announced and waited before ramming the door. See CR 96 (Maybrown Aff. Ex. C).

[4] A police department review board concluded that this shooting was justified. One SPD officer, however,

d. KIRO TV Videotape

On February 6, 1988, ACT II brought members of a television news team along to videotape the execution of two search warrants. KIRO TV broadcast a tape of these raids several times during the following days. See CR 47 (Pillon Aff. App. D). The tape very clearly shows the officers breaking down doors to two houses without satisfying the knock and wait

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disagreed with this judgment:

> While I can understand the tension that exists during this type of police activity, the officer's use of his firearm under the described conditions is in my opinion not justified and should be classified as such.
>
> This is the second discharge by Officer Black during a drug raid although circumstances are different in each of the cases. It is also at least the third discharge in the last couple of years under somewhat similar circumstances.

See CR 96 (Maybrown Aff. Ex. D).

requirement. See CR 97 (McBride Supp. Aff. at Para. 16).

During the first taped search, the same officer who became tangled in the screen on April 7, 1987 is seen kicking open the door immediately after he reaches the threshold of the home. There was no knock and no announcement prior to entry. See Miller Dep. at 27-39, 43.

During the second search that evening, Officers Rusness and Murray -- the same officers who forced open the door to the Bascomb Apartment -- are seen hitting the door with the ram immediately upon reaching the threshold of the home. The officers yelled "Seattle Police" contemporaneously with their breaking the door open with the ram. Other than the blow with the ram, the officers did not

knock on the door and request admission. See Miller Dep. at 33-34.[5]

The KIRO tape is strong evidence regarding the routine practices of the ACT officers. Even knowing that these entries had been taped, the officers prepared reports which did not accurately describe the entries. Instead, the officers prepare falsified reports -- including "stock" allegations that were expected to pass muster under the knock and wait requirement. The officers never contended that exigent circumstances existed in either of these raids. See CR 97, 155.

e. Pillon Letter of February 9, 1988

On February 9, 1988, just eight days before the shooting of Erdman Bascomb, the leader of ACT I again warned Chief

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[5] Before approaching the door to execute the second search, the officers are heard joking about their exploits. One officer says "rock and party" and others reply: its "party time."

Fitzsimons that continued drug raids were sure to cause additional bloodshed and urged the chief to view the KIRO TV news report. Sgt. Pillon explained:

> Sunday evening a local T.V. station broadcast coverage of two raids conducted by one of our A.C.T.'s if you have not seen this footage you should A.S.A.P. I am obtaining it from them, and will make it available.
>
> What it portrays is precisely how a well intended program can go wrong, and in the process create danger, and terror for the innocents caught in its path. Officers forced their way into two different homes in the nighttime, amid shouting, and confusion, and immediately found small children, terrified, and confused, in their path. These youngsters finally were forced to the floor, and contained but at incredible risk of injury or death from the officers who were also a threat to themselves. The tragic accidental death of WM. Tucker last week emphasizes this risk beyond any honest argument.
>
> There are those on your staff I am sure who will tell you this is all proper, and necessary -- That search

warrants were in hand, and such work is necessary to deal with the rock house problem. It is just the misfortune of such as those youngsters, or the late WM. Tucker even, to be caught in the middle of what has to be, they will say; regrettable but inevitable. This is a travesty!

. . .

And consider that the frenzy of this activity has brought the few officers on these teams to the point of exhaustion. they are at danger to themselves, and the public as well. Imagine if the young officer who had fired at the shirt in the window some weeks back had killed a youngster fleeing the uproar and confusion so clearly identified in that T.V. footage.

. . .

I urge you to command those who plan, and execute these raids to refrain from such violent entries in such cases, and even to hand them off the patrol force for peaceful intervention as we did. Contact Child Protective Services. They came quickly to our assistance in such cases, and together we enhanced the welfare of these children and their parents as well.

> Please do this for the children. I submit that it is an inherently excessive use of police force to utilize such tactics where children are present. There is not enough dope in the country to justify the harm that is being done. These youngsters can be emotionally scarred for life, and forever distrusting of the police.

CR 46 (Pillon Aff. at App. C).

Chief Fitzsimons admits that he had received Pillon's letter, that he knew about these incidents and that he viewed the videotape, all before the Bascomb shooting. See Fitzsimons Dep. at 18-51. Even so, Fitzsimons took no steps to remedy the constitutional violations which were evidenced by these incidents.

Based upon these facts, respondents' expert rendered an opinion that Fitzsimons' conduct "amounted to deliberate indifference to the rights of the citizens of Seattle, and this failure directly caused the shooting death of

Erdman Bascomb." McBride Supp. Aff. at Para. 18.

B. PROCEDURAL HISTORY

In January 1991, the Bascomb family initiated this wrongful death action against the City of Seattle, Chief Fitzsimons and Officer Lisoski. Among their several claims, the Bascombs allege that Lisoski and Fitzsimons violated the Civil Rights Act, 42 U.S.C. § 1983. They claim that Lisoski used excessive and unreasonable force in seizing Erdman Bascomb. As to Fitzsimons, the Bascombs claim that he failed to adequately train, supervise and discipline his officers and that Fitzsimons' inaction set in motion a series of acts which he should have known would cause ACT officers -- like Lisoski -- to inflict unconstitutional injury.

Lisoski moved for summary judgment on the basis of qualified immunity. Relying upon his own statement of the facts,

Lisoski claimed that those facts did not support a finding that he had violated any clearly established right. Some weeks later, Fitzsimons filed a motion for summary judgment. Fitzsimons filed no memorandum in support of his motion and he did not raise the qualified immunity issue until the filing of his reply brief.

On April 23, 1992, after reviewing extensive briefing and after hearing oral argument, the trial court ruled that Lisoski and Fitzsimons were not immune from suit as to respondents' unreasonable force claim. Noting that there were "factual disputes [which] underlie the reasonableness determination," Petition App. 14, the court held that because plaintiffs had presented substantial evidence that Lisoski's actions were objectively unreasonable, this ultimate issue must be resolved by the jury.

As to Chief Fitzsimons, the court ruled that he had not properly raised the qualified immunity issue. See id. at App. 29. Nevertheless, the court was

> convinced that Chief Fitzsimons is not entitled to such immunity. As discussed above, Erdman Bascomb's constitutional right against use of excessive force was clearly established at the time of his death. As with Officer Lisoski's motion for qualified immunity, the reasonableness of Chief Fitzsimons' actions must be left to the jury.

Id.

The City also moved for summary judgment asking the court to dismiss respondents' municipal liability claims. The court rejected all of the City's arguments, concluding that Fitzsimons' actions, and inactions, constitute policy for the City of Seattle[6] and that the Bascombs had presented ample evidence that

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[6] The City has never disputed this finding. See Petition App. 22.

the City failed to adequately train, supervise and discipline its officers.

Thereafter, the police officers filed an interlocutory appeal in the Ninth Circuit of Appeals. On September 21, 1992, after reviewing the parties' briefing, a panel of the appellate court dismissed the appeal because petitioners' immunity claims were not separable from the disputed factual issues in this case.[7]

III. SUMMARY OF ARGUMENT

Petitioners concede that the trial court applied the proper standard when reviewing their motions for summary judgment of dismissal based upon the

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[7] It is noteworthy that the officers did not file their opening brief in a timely fashion and that this also provided sufficient grounds for dismissal of the appeal. See FRAP 31(c); Circuit Rule 31-2.4. However, because of its resolution of respondents' motion to dismiss, the court did not ultimately rule upon this issue.

qualified immunity defense. Petitioners also concede that the law was clearly established at the time Erdman Bascomb was killed. Viewing the evidence in the light most favorable to the respondents, it is clear that both petitioners violated Erdman's clearly established rights and that the district court properly concluded that petitioners were not entitled to immunity.

In reviewing the district court's decision, the Ninth Circuit found that no "purely legal" question was presented in the appeal. Petitioners did not claim that the law was not clearly established; rather, they present factual denials to respondents' claims. Like all other courts that have addressed such "we didn't do it" claims, the Ninth Circuit correctly dismissed the appeal.

For all these reasons, this is not an appropriate case for this Court to grant certiorari.

IV. ARGUMENT

A. BECAUSE DISPUTED FACTUAL ISSUES EXISTED, THE NINTH CIRCUIT PROPERLY DISMISSED PETITIONERS' INTERLOCUTORY APPEAL.

In Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), this Court held that the denial of a motion to dismiss or for summary judgment based on qualified immunity is a collateral order, appealable under the principles articulated in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). In so ruling, the Court emphasized that the qualified immunity inquiry is to

> "permit the resolution of many insubstantial claims on summary judgment" and to avoid "subjecting government officials either to the costs of trial or to the burdens of broad-reaching discovery" in cases where the legal norms the officials are

> alleged to have violated were not clearly established at the time. [Harlow v. Fitzgerald, 457 U.S. 800, 817, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)].
>
> Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery. Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.

Mitchell, 472 U.S. at 526 (some citations omitted). See also Anderson v. Creighton, 483 U.S. 635, 646 n.6, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).

Applying Cohen, the Court ultimately concluded that the issue immediately appealable was the "essentially legal question whether the conduct of which the plaintiff complains violated clearly established law." 472 U.S. at 526

(emphasis added). In so ruling, the Court explained that an appellate court would not be called upon to

> consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law . . .

472 U.S. at 528. Accordingly, "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." 472 U.S. at 530 (emphasis added).

Based upon Mitchell, the Ninth Circuit has correctly identified certain situations -- cases in which the crucial factual issues are in dispute -- where an appellate court cannot effectively review the qualified immunity question. See Velasquez v. Senko, 813 F.2d 1509 (9th

Cir. 1987). In essence, the Ninth Circuit has concluded that where a genuine factual dispute exists and where defendants could not be entitled to immunity if the plaintiff's version of the facts are correct, the trial court's denial of a motion for summary judgment cannot be immediately appealed. See Velasquez, 813 F.2d at 1511.

The Ninth Circuit's approach is in accord with all other circuit courts which have addressed this question. See, e.g., Cartier v. Lussier, 955 F.2d 841, 844 (2d Cir. 1992); DiMarco v. Rome Hospital, 952 F.2d 661, 665 (2d Cir. 1992); Hurlman v. Rice, 927 F.2d 74, 79 (2d Cir. 1991); Kaminsky v. Rosenblum, 929 F.2d 922 (2d Cir. 1991); Schrob v. Catterson, 967 F.2d 929, 938-39 (3d Cir. 1992); Lion Boulos v. Wilson, 834 F.2d 504, 509 (5th Cir. 1987); Elliot v. Thomas, 937 F.2d 338, 342 (7th Cir. 1991), cert. denied, ___ U.S. ___.

112 S.Ct. 973, 117 L.Ed.2d 138 (1992); Zuchel v. Spinharney, 890 F.2d 273 (10th Cir. 1989); Peppers v. Coates, 887 F.2d 1493, 1497 (11th Cir. 1989)[8]; Crawford-El v. Britton, 951 F.2d 1314, 1317 (D.C. Cir. 1991) cert. denied, ___ U.S. ___, 113 S.Ct. 62, 121 L.Ed.2d 29 (1992).

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[8] In Howell v. Evans, 922 F.2d 712 (11th Cir. 1991), the Eleventh Circuit suggested that an appeal should not be quashed merely because the facts are in dispute, but the Howell decision was subsequently vacated. See 931 F.2d 711.

In Craft v. Wipf, 810 F.2d 170, 173 (8th Cir. 1987) (per curium), the Eight Circuit held that defendants were entitled to appeal from a pretrial order refusing to entertain motions raising the qualified immunity defense. In dicta, the court noted that it is "best to avoid hinging appealability itself on the degree of 'factualness' of the issues." 810 F.2d at 172. No other court has adopted that aspect of the Craft court's opinion. See Elliot, 937 F.2d at 342 (rejecting Craft analysis). Moreover, the Craft court went on to explain that "not all denials of qualified immunity will be immediately appealable, no matter how 'factual' the question." 810 F.2d at 172 (emphasis in original).

The Seventh Circuit's decision in Elliot is instructive on this point. There, Judge Easterbrook wrote:

> Yet the reason a court of appeals examines the facts is to determine whether it was "clearly established" at that time that such deeds were forbidden. It would extend Mitchell well beyond its rationale to accept an appeal containing nothing but a factual issue. We have expressed concern that being too ready to entertain interlocutory appeals on immunity grounds would increase the expense plaintiffs must bear, and the delay they must endure, to vindicate their rights. If a general defense on the merits supports interlocutory appeal, then every public defendant is entitled to pretrial appellate decision. Mitchell did not create a general exception to the finality doctrine for public employees.

Elliot, 937 F.2d at 342.

As was readily apparent to the trial court and the appellate court in this case, petitioners' immunity claims are no more than factual denials. Accepting respondents' facts, as the courts must,

the officers had undoubtedly violated Erdman's clearly established rights. No "purely legal" question was presented in the appeal.

Relying upon Velasquez, the Ninth Circuit properly dismissed petitioners' interlocutory appeal. It is certainly not appropriate for an appellate court to resolve disputed factual issues in the guise of a ruling on qualified immunity. Petitioners have presented no legal issues which may be resolved by way of an interlocutory appeal.

Hunter v. Bryant, 502 U.S. ___, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991), wherein this Court held that Secret Service agents who had reasonable grounds to believe that a person had threatened the life of the President, does not suggest a different result. There, the undisputed facts established that the agents were entitled to qualified immunity. Here, by contrast,

the officers' immunity claims are based wholly upon disputed facts.

B. THE DISTRICT COURT CORRECTLY DENIED PETITIONERS' IMMUNITY CLAIMS.

Government officials performing discretionary functions enjoy qualified immunity from liability for civil damages so long as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818. Immunity attaches if the official's conduct is objectively reasonable "as measured by reference to clearly established law." Id. See also Davis v. Scherer, 468 U.S. 183, 191-94, 104 S.Ct. 3012, 82 L.Ed.2d 919 (1984).

Presenting an extraordinarily slanted description of the "facts" in this case, petitioners now ask this Court to review the qualified immunity issue. Upon this

record, however, no court could conclude that either officer is entitled to immunity; and certainly no court could do so if it resolved all factual disputes in favor of the respondents, as it must when evaluating a motion for summary judgment.[9]

1. The officers violated clearly established rights.

The Bascombs allege a violation of rights which were clearly established at the time of the shooting. First, in the seminal case of Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), this Court concluded that the use of deadly force to apprehend a fleeing suspect who was neither armed nor otherwise dangerous violated the suspect's constitutional rights, notwithstanding the existence of probable cause to arrest.

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[9] Petitioners concede that this is the correct standard. See Petition at i (question presented 2) and 16.

In Garner, the Court commenced its analysis by noting that the "intrusiveness of a seizure by means of deadly force is unmatched" and that the use of deadly force "frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment." 471 U.S. at 9. In light of these fundamental principles, the Court concluded that a "police officer may not seize an unarmed, nondangerous suspect by shooting him dead." 471 U.S. at 11. The Court also held that, even in situations where the suspect threatens the officer with a weapon, deadly force may be used only after some warning is given if feasible. See 471 U.S. at 11-12.

Since Garner, countless courts have applied the Fourth Amendment's "objective reasonableness" standard to situations where an officer uses deadly force. See, e.g., Curnow v. Ridgecrest Police, 952

F.2d 321 (9th Cir. 1991) cert. denied, ___ U.S. ___, 113 S.Ct. 460, 121 L.Ed.2d 369 (1992); Smith v. City of Fontana, 818 F.2d 1411 (9th Cir. 1987), cert. denied, 484 U.S. 936, 108 S.Ct. 311, 98 L.Ed.2d 269 (1988); Davis v. Little, 851 F.2d 605 (2d Cir. 1988).[10] See also Zuchel v. Spinharney, 890 F.2d 273 (10th Cir. 1989); Reed v. Hoy, 891 F.2d 1421 (9th Cir. 1989), cert. denied, ___ U.S. ___, 111 S.Ct. 2087, 115 L.Ed.2d 1053 (1990); Fargo v. City of San Juan Bautista, 857 F.2d 638, 641 (9th Cir. 1988). Similarly, every person has the right not to be subjected to unreasonable or excessive

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[10] In fact, on January 3, 1986 and March 28, 1986, SPD's attorneys distributed bulletins which informed all police officers that they might be held liable if they acted unreasonably in using deadly force. See CR 60 (Att. A). Quoting extensively from Garner, the bulletins explained that "the Court specifically requires some warning, if feasible, prior to the use of deadly force." Id. No warning was given in this case.

force by a police officer. See, e.g., Graham v. Connor, 490 U.S. 386, 109 S.Ct. 54, 102 L.Ed.2d 32 (1989); Barlow v. Ground, 943 F.2d 1132, 1135 (9th Cir. 1991), cert. denied, ___ U.S. ___, 112 S.Ct. 2995, 120 L.Ed.2d 872 (1992).

Second, Fourth Amendment jurisprudence has long recognized the right to be free from unreasonable searches, see, e.g., Terry v. Ohio, 392 U.S. 1, 22-27, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); Ker v. California, 374 U.S. 23, 33, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963), and it has long been settled that searches and seizures conducted in violation of the Fourth Amendment are actionable under the Civil Rights Act. See, e.g., Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).

When executing a search warrant, the Fourth Amendment requires that public officers knock, announce their presence

and wait a reasonable period of time before entering a person's home. See, e.g., Ker v. California, 374 U.S. at 40-41; United States v. Bustamante-Gamez, 488 F.2d 4 (9th Cir. 1973), cert. denied, 416 U.S. 970, 94 S.Ct. 1993, 40 L.Ed.2d 559 (1974); Rivera v. United States, 928 F.2d 592 (2d Cir. 1991); U.S. v. Mapp, 476 F.2d 67, 75 (2d Cir. 1973); State v. Coyle, 95 Wash. 2d 1, 621 P.2d 1256 (1980); State v. Edwards, 20 Wash. App. 648, 581 P.2d 154 (1978). The knock and wait rule "is deeply rooted in our heritage" and codifies

> a tradition embedded in Anglo-American law . . . [declaring] the reverence of the law for the individual's right to privacy in his house. Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house.

Miller v. U.S., 357 U.S. 301, 313, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958).

Moreover, the rule is not a technical road block to police action, but addresses important practical concerns:

> Compliance is also a safeguard for the police themselves who might be mistaken for prowlers and be shot down by a fearful homeowner.

Id.[11]

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[11] One Washington court has explained:

> The purpose of the general rule is to ensure that an individual's right to privacy within his home will not be arbitrarily violated. An individual should be given an opportunity to be apprised of an officer's authority, of his purpose, and be permitted a reasonable opportunity to voluntarily admit the officer into his home. An equally important purpose for the rule is to protect the officer himself. The unannounced breaking and entering of a private dwelling could easily lead an individual to believe his safety, and that of his family, was in peril, causing him to take violent defensive measures which he otherwise would not have taken had he known a warrant had been issued to search his home. This is

The Washington knock and announce statute, RCW 10.31.040, permits an officer to break into a house to execute a search or arrest warrant "if, after notice of his office and purpose, he be refused admittance."[12] This statute was enacted in 1881, and was based upon an earlier 1854 law. Cases substantially predating the 1988 killing make it clear that the rule is grounded upon the Fourth and Fourteenth Amendments of the United States Constitution. See, e.g., Coyle, 95 Wash. 2d at 5-9.

> particularly true when the officers are not in uniform.

State v. Edwards, 20 Wash. App. 648, 652, 581 P.2d 154 (1978) (quoting State v. Lowrie, 12 Wash. App. 155, 157, 528 P.2d 1010 (1974)) (emphasis in original).

[12] The Washington rule is substantially identical to 18 U.S.C. § 3109, which permits government agents to break into a house or building only "if, after notice of his authority and purpose, he is refused admittance."

Violation of the knock and wait rule will make out a violation under Section 1983. See, e.g., Rivera, 928 F.2d 592. Whether the police actually complied with the requirement, or whether exigent circumstances existed to excuse compliance, is a "fact specific" issue where a court "is required to resolve all ambiguities and draw all factual inferences in favor of the party against whom summary judgment is sought." Rivera, 928 F.2d at 607.

Consistent with these explicit authorities, the trial court correctly found that the law was clearly established at the time Erdman was killed. See Petition App. 8-10. In point of fact, the officers did not suggest otherwise in their arguments below, but instead claimed that respondents had asserted these constitutional rights in an overly broad manner. See id. at 9. This contention

was rejected by the trial court. See id. at 10.

In their petition for certiorari to this Court, the officers do not argue that the law was not clearly established. In conceding the controlling question from Mitchell and its progeny, there can be no claim that their appeal was improperly dismissed. As explained by Judge Easterbrook:

> When rules of law clearly establish public officials' duty, the immunity defense is unavailable. So, too, the interlocutory appeal to vindicate the right not to be tried is unavailable when there is no legal uncertainty; there is no separate "right not to be tried" on the question whether the defendants did the deeds alleged; that is precisely the question for trial.

Elliot, 937 F.2d at 341. Petitioners' immunity claims are no different than "we didn't do it" claims which have been dismissed by every appellate court which has addressed such claims. See, e.g.,

Schrob, 967 F.2d at 939; Elliot, 937 F.2d at 342; Velasquez, 813 F.2d at 1511.

2. The District Court properly concluded that the officers were not immune.

Petitioners acknowledge that the trial court utilized the correct standard by "viewing the evidence in the light most favorable to the respondents . . ." Petition at i, 16. However, the petitioners go on to offer an utterly disingenuous description of the facts in this case. Viewed through the proper evidentiary prism, it is clear that both petitioners violated Erdman's clearly established rights, and that qualified immunity was properly denied. See Curnow, 925 F.2d at 325.

Taking the evidence most favorably to the respondents, the facts regarding the incident are as follows:

1. There were no exigent circumstances which would excuse

compliance with the knock and wait rule.

2. The officers did not knock, announce or wait prior to smashing through the Apartment door.

3. The ACT officers forced open doors 99 % of the time they were executing warrants.

4. At the time of the entry, Erdman was lying on a couch, watching television. Erdman was unarmed and helpless; he posed no threat to the ACT officers.

5. Lisoski shot Erdman less than one second after he entered the Apartment. Lisoski fired his weapon so quickly that he could not see anything about the person he shot. He could not see the person's face or eyes. He could not tell if he was firing at a man or a woman. And, he could not determine the color or race of the person that he shot.

6. Lisoski provided no warning before shooting and killing Erdman.

7. Based upon a review of the path of the bullet through Erdman's body as determined at the autopsy and Lisoski's position when he fired his weapon, a criminalist determined that it would have been impossible for Bascomb to have

been turning towards Lisoski, as Lisoski claimed, because this would have resulted in a substantially different angle of the entry wound. Rather, Bascomb was turning his body away from Lisoski at the time he was shot. See CR 64 (Murren Aff. at 3-4).

8. Lisoski did not have probable cause to believe Erdman had committed any crime involving infliction of harm. Neither firearms nor controlled substances were found in the Apartment.

9. After being mortally wounded, Bascomb asked the officers "what's going on?" or "why did you do it?"

10. The officers knew that the room they were entering was dark, but they did not use their flashlights.

11. Before Erdman was killed, Chief Fitzsimons knew that the ACT officers routinely violated the knock and wait rule and that the officers were badly in need of firearm training. Although Fitzsimons had both actual and constructive knowledge of the ACT's unconstitutional customs and policies, he chose to take no remedial action.

When deciding a motion for summary judgment, the court may not make

credibility determinations nor may the court weigh any of the evidence. "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Viewing all the "justifiable inferences" in favor of the respondents, the following is established:

1. Bascomb did not point the TV channel changer, or anything else, at Lisoski.

(a) Such an act is illogical and unbelievable;

(b) Rather than turning towards Lisoski, as the officer claimed, Erdman was turning his body away from Lisoski, which would have been a defensive or frightened type of response;

(c) There was nothing in this Apartment that Erdman needed to protect; and

(d) Erdman did not have sufficient time to take such action.

2. Erdman was not stepping off the couch and placing his leg on the floor, as Lisoski claimed, because witnesses remember seeing both of Erdman's legs on the couch almost immediately after he was shot.

3. Erdman's dying declaration established that he did not know why he was shot, thereby contradicting Lisoski's claim that Erdman had made some threatening gesture.

4. Lisoski knew that the two officers handling the ram did not, and would not, comply with the knock and wait rule.

5. In entering a residence at 11:45 p.m., without knocking and waiting, Lisoski knew that he might encounter residents who would either not know what was happening, or might mistakenly believe that they were being burgled, thereby creating a great danger to the officers and residents.

6. If the ACT officers had knocked and waited before ramming the Apartment door, Erdman would have come to the door and Erdman would not have been killed.

7. If Chief Fitzsimons had properly trained, supervised and disciplined his officers, Erdman would not have been killed.

The qualified immunity enjoyed by police officers protects them against a suit for damages where the undisputed evidence shows that the officers "acted reasonably under settled law in the circumstances." Hunter, 502 U.S. at ___, 112 S.Ct. at 537 (emphasis added). While this inquiry requires the court to view the objective facts from the perspective of the officers claiming immunity, the court is not required to accept the facts as presented by the officers. Here, a genuine factual dispute exists as to "the circumstances" surrounding Erdman's death.

Respondents have presented compelling evidence, not only direct, but also circumstantial, which defeats Lisoski's self-serving claims. As Abraham Lincoln so eloquently explained, circumstantial evidence is often more valuable than direct evidence:

> We better know there is fire whence we see much spoke rising than we could know it by one or two witnesses swearing to it. The witnesses may commit perjury, but the smoke cannot.

See, e.g., Hopkins v. Andaya, 958 F.2d 881, 888 (9th Cir. 1992) (quoting Abraham Lincoln).

Ignoring all of the evils which have been disclosed to the lower courts, petitioners continue to claim that "Fitzsimons was not personally involved in any way with the use of force against Erdman Bascomb." Petition at 24. This claim is plainly silly. See CR 47, 94 (affidavits of Charles Pillon); CR 97 (supplemental affidavit of Robert McBride); and CR 93. Based upon the events during the weeks preceding Erdman's death -- the shooting of William Tucker, the KIRO videotape, the Seattle Times news article, the letter from Sgt. Pillon -- Fitzsimons had every reason to believe

that his officers would violate the rights of citizens like Erdman Bascomb. Nonetheless, Fitzsimons chose to do nothing to rectify the situation.[13]

C. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THESE INTERLOCUTORY ORDERS.

This Court has long recognized that it "should not issue a writ of certiorari to review a decree of the circuit court of appeals and appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." American Construction Co. v. Jacksonville, T. & K.R. Co., 148 U.S. 372, 384, 13 S.Ct. 758, 37 L.Ed.2d 486 (1893) (emphasis added). See also Hamilton-

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[13] The irony of Fitzsimons' present claims should not be lost on this Court. Just as Fitzsimons was deliberately indifferent to the rights of Erdman Bascomb, petitioners continue to ignore all of the evidence which establishes his indifference.

Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258, 36 S.Ct. 269, 60 L.Ed.2d 629 (1916); Justice William Brennan, Some Thoughts on the Supreme Court's Workload, 66 Judicature 230, 231-232 (1983). Denial of certiorari at the interlocutory stage of a proceeding is without prejudice to renewal of the questions presented when certiorari is later sought from the final judgment, assuming the questions are properly preserved in the lower courts after the initial denial. See, e.g., Urie v. Thompson, 337 U.S. 163, 172-73, 69 S.Ct. 1018, 93 L.Ed.2d 1282 (1949); Reece v. Georgia, 350 U.S. 85, 87, 76 S.Ct. 167, 100 L.Ed.2d 77 (1955); Washington v. Fishing Vessel Assn., 443 U.S. 658, 672 n.19, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979).

When analyzing petitioners' claims, this Court must recognize that the trial court's denial of the motions for summary

judgment grounded in qualified immunity does not preclude a finding of qualified immunity at trial. See, e.g., Vaughan v. Ricketts, 950 F.2d 1464, 1468 (9th Cir. 1991).

Because petitioners will have an opportunity to raise the qualified immunity issue once the facts have been presented at trial, this Court should not invoke its certiorari jurisdiction at this time.

V. CONCLUSION

For all of these reasons, petitioners' request for certiorari must be denied.

DATED this 16th day of March, 1993.

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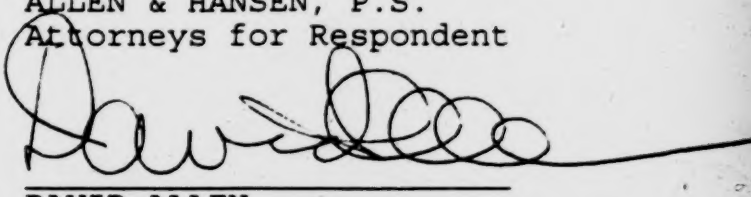

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